LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 30 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1618

S. J. PASTORELLE,
Petitioner,

vs.

J. W. COLLINS, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

SAFFORD W. LEKOVER,
711 Leader Building,
Cleveland, Ohio 44114,
Attorney for Petitioner.

THE GOLDEN LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. [illegible]

TABLE OF CONTENTS.

APPENDIX A. Opinions and Judgments Below:

Opinion of the Court of Common Pleas of Cuyahoga County, Ohio ---------- 1

Opinion of the Court of Appeals of Cuyahoga County, Ohio ---------- 5

Orders of the Supreme Court of Ohio ---------- 8

APPENDIX B. Portions of the Record Below Wherein Evidence of Non-Compliance with Federal Constitutional Requirements are Shown:

Excerpts from Record of the Court of Common Pleas of Cuyahoga County, Ohio ---------- 9

Questions of Law Presented to the Court of Appeals of Cuyahoga County, Ohio ---------- 57

Questions of Law Presented to the Supreme Court of Ohio ---------- 58

APPENDIX C. Constitutional and Statutory Provisions:

Constitution of the United States. Amendment XIV, Section I ---------- 61

United States Code, Title 42:

§ 291. Congressional declaration of purpose -- 61

§ 1983. Civil action for deprivation of rights -- 62

§ 1985. Conspiracy to interfere with civil rights—Preventing officers from performing duties ---------- 62

APPENDIX A.

OPINIONS AND JUDGMENTS BELOW.

OPINION OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO.

(October 30, 1968.)

No. 840,185.

IN THE COURT OF COMMON PLEAS

THE STATE OF OHIO, COUNTY OF CUYAHOGA, SS:

S. J. PASTORELLE,

Plaintiff,

vs.

JAY W. COLLINS, *et al.,*

Defendants.

OPINION OF THE COURT.

HODDINOTT, *J.*: I am going to consider the defendants' motion as a motion for judgment at the conclusion of the plaintiff's case in chief. That motion will be granted. Judgment will be awarded to the defendants against the plaintiff on all three causes of action.

I do this because I do not see any contested material questions of fact which should be submitted to the jury. My analysis, I suppose is somewhat different from that of the attorneys. It seems to me that among other things there are three intentional torts involved:

Interference with professional relationships, libel and slander.

It does not appear that there was any intentional injury as far as business relationship or as far as reputa-

tion. However, in an intentional tort the question of privilege also rises, whether the defendants were justified in causing the injury which they caused the plaintiffs.

Now, this question of privilege, let alone intentional, is somewhat older than the rest of the tort law. The special rule, although there is some evaluation of intentional tort, is probably by the wayside here, but who is to decide whether there is privilege? The Court or the jury?

Under the old rule it was the Court's decision whether there was an invasion of property rights or reputation or privilege. The Court had that in mind, that the claimed privilege was not in dispute.

Now, a more modern idea about privilege, we look at it that the burden would be on the defendant to prove that there was privilege. Disinterested parties may defend a matter of great public importance such as a public hospital, these are all subjects that are privileged.

It seems to me no matter how we approach that there is privilege and there was privilege. There was an invasion of rights. It seems to me the plaintiff's evidence gives rise to the inference that the defendants had privilege.

Taking the second approach, the more modern approach, looking at the plaintiff's evidence in the best possible light, it seems to me no reasonable jury could find other than that the defendants had this privilege, so whether the Court makes the determination or whether this goes to the jury, it seems to me that the evidence is such that as a matter of law the defendants did have this privilege.

It seems to me that as far as the third cause of action is concerned, that the comments of Mr. Collins were fair comments on a matter of public interest. He had a right to make these comments to the newspaper reporter. It is part of free speech as to public figures.

Where there is privilege, a plaintiff cannot recover unless he shows actual malice. It is not legal malice, that is, spite, ill will, or hatred in the actions of the defendants. We have to determine whether there was actual malice. Of course, there is some hostility between the plaintiff and the defendants, which is only natural. It seems to me that is caused by the plaintiff's actions rather than the defendants' in taking the action they took.

On this matter of conspiracy, I go along with Prosser on Torts. For the most part, a wrong is a tort. Conspiracy is the way in which it is committed. Conspiracy determines who is responsible for the tort. Conspiracy itself is usually not a wrong, not an act for which damages can be recovered.

There is some exception in the field of business; competition is looked upon as being a desirable feature. It is all right for one businessman to deflect customers from others to get them for himself, but if a whole group of businessmen do it together, that is unlawful, that is a kind of conspiracy. It is unlawful.

But we do not have this kind of thing here. These doctors are not trying to divide his patients among themselves; there is no evidence of that. There is conspiracy which is set forth in the Civil Rights Act which is unlawful, but I can't see how the Civil Rights Act applies in this case. Just reading it, they are aimed at the Ku-Klux Klan and that type of activity. There is no evidence of that here.

Of course, there is the Meredith case. The whole subject applies to the Civil Rights statute. I believe the Meredith case is entirely right as far as its narrow holdings, but this language about the Civil Rights Act, I don't understand. It seems to me that due process does apply to this case by reason primarily of Article 1, Section 16, of

the Ohio Constitution, but due process that is considered in connection with this particular situation as applied to this case, it seems to me that the only requirement is that the action—the proceedings on the part of the hospital officials and committees must be fair. In fact, that is what the Meredith case says; so that the proceedings by which the doctor is relieved of his privileges must be fair. If there are regulations and by-laws which set up the procedures whereby the doctor is to be relieved of his privileges, it is necessary they be followed. He should have notice of what he is being accused of. He should have an opportunity to appear before his accusers and defend himself. That has been done here. He has had fair treatment, as far as that is concerned. I don't think it is otherwise.

I think due process, whether he had a fair hearing, is a matter for the Court to decide. It is a legal question. I mean the jury, on such a technical matter as this, whether the proceedings were fair or not, is not qualified. That seems to be the attitude of the Meredith case. It pointed out that a summary judgment proceedings is what was called for in this matter—the matter of fairness.

This has been somewhat incoherent. I have made a few notes, jotted down my reasoning as well as the reasons for the decision.

Defendants will prepare and present to opposing counsel a Journal Entry which will be submitted to the Court.

We have a jury upstairs. Of course, it is only right that we should call them down. Let's wait about five minutes.

OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

No. 29507

IN THE COURT OF APPEALS OF OHIO

CUYAHOGA COUNTY, EIGHTH DISTRICT.

S. J. PASTORELLE,

Plaintiff-Appellant,

vs.

JAY W. COLLINS, *et al.,*

Defendants-Appellees.

MEMORANDUM.

BRENNEMAN, *P.J.*

This appeal is lodged in this Court, upon questions of law, from a judgment entered by the Court of Common Pleas of Cuyahoga County, in favor of all defendants, upon a motion for a directed verdict made by counsel for all defendants at the close of plaintiff's evidence.

Plaintiff filed an action seeking damages for an alleged conspiracy on the part of the defendants to libel and slander the plaintiff, claiming that the defendants wrongfully and maliciously charged the plaintiff with unprofessional and unskillful treatment of his patients, in his capacity as a doctor of medicine; and, in furtherance of said conspiracy, that defendants caused the termination of the privileges of plaintiff to practice medicine in the Euclid-Glenville Hospital.

For a second cause of action, plaintiff asserts that he was denied "due process of law and of equal protection of the law," incident to the proceedings terminating his privileges in said Hospital, contrary to the provisions of

the Constitution of Ohio, and the Constitution of the United States.

For a third cause of action, plaintiff claims that certain of the defendants maliciously caused publication of the termination of plaintiff's hospital privileges to be published in the Cleveland Press, for the purpose of exposing the plaintiff to public contempt and ridicule.

As damages for all three causes of action, both compensatory and exemplary, plaintiff asked judgment for $2,750,000.

The defendants were thirty-eight in number; all of whom were doctors of medicine, and/or members of the Board of Trustees of the Euclid-Glenville Hospital Association; the Executive Director of the Hospital; the members of the various staffs of the Hospital, including the members of the Executive Committee of the active medical staff, and other organizational committees functioning incident to the rules and regulations of the Hospital, and the members thereof.

Plaintiff's cause was tried before a jury, and the trial was, of necessity, a long and most difficult one. The record before this Court consists of nearly 1400 pages of testimony; many exhibits; and numerous pages of pleadings.

At the close of plaintiff's case in the trial Court, the defendants moved for a directed verdict, and the Court, in consideration thereof, treated the motion as one for judgment, and entered a judgment in favor of all defendants.

From this order, plaintiff appeals and now asserts three errors, all of which, taken together, claim that such order was contrary to law and against the manifest weight of the evidence; as well as claiming that the trial Court erred in entering judgment for the defendants.

This Court, in consideration of all of the claimed errors asserted by the plaintiff, has examined with utmost care the entire transcript, and the long and lengthy bill of exceptions; we have perused the exhibits, and have studied the comprehensive briefs as filed by the parties.

We have come to the conclusion, after giving to the plaintiff the full benefit of the evidence as submitted, that the judgment entered by the trial Court, upon its determination of the evidence, was proper.

We find no error prejudicial to any substantial right of the plaintiff; and, finding none, we determine that the judgment entered by the Court of Common Pleas must be affirmed.

Judgment affirmed.

HUNSICKER, *P.J.*, and DOYLE, *J.*, concur.

ORDERS OF THE SUPREME COURT OF OHIO.

(Entered December 23, 1970.)

No. 70-655.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS.

S. J. PASTORELLE,

Appellant,

vs.

JAY W. COLLINS, *et al.*,

Appellees.

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

APPENDIX B.

PORTIONS OF THE RECORD BELOW WHEREIN EVIDENCE OF NON-COMPLIANCE WITH FEDERAL CONSTITUTIONAL REQUIREMENTS ARE SHOWN.

EXCERPTS FROM RECORD OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY.

(74*) By Mr. Likover:

Q. Mr. Collins, I believe my last question to you was: When was the next time that the Executive Committee took up (75) any matter involving Dr. Pastorelle? A. The next occasion subsequent to the meeting of August 13th was August 27th, two weeks later.

Q. This is the Executive Committee meeting which is evidenced by Joint Exhibit 18? A. Yes.

Q. The sole business before that meeting was Dr. Pastorelle's relationship with the Kaval patient? A. Yes.

Q. Was Dr. Pastorelle notified of that meeting? A. I presume not; he was not invited to attend.

Q. Who was present at that meeting? A. Members of the Executive Committee. Do you want me to read it?

Q. Yes. A. Dr. LaMaida, who was presiding, Drs. Messina, Fanney, Waltz, Hacker, Price, Whitaker and Parran. I was present. There were two guests—

Q. Who were the guests? A. —two guests who appeared in due course, not at the same time.

Q. Who were they? A. First, Dr. Karl Alfred, Director of the Orthopedic Service.

Q. Who else? (76) A. Subsequently Dr. Richard L. Taylor, a general surgeon.

* * * * *

* Boldface numerals in parentheses refer to the pages of the original typewritten record.

(86) Q. Did any other orthopedic surgeons—traumatic or orthopedic surgeons appear before the Executive Committee to discuss the Kaval case? A. No, just the Chief, Director of Orthopedics.

Q. Then at this meeting on August 27th another physician testified? A. Yes.

Q. Dr. Richard Taylor? A. Yes.

Q. At this meeting on August 27th, was there any other doctor who testified or made a statement? A. Members of the Committee made statements.

Q. With reference to the treatment of the Kaval boy? A. With reference to the Kaval case. Exactly what they (87) said, I would have to review the minutes word for word. Dr. Hacker said that the patient was admitted to the hospital by Dr. Taylor through the emergency room. That was part of the comment on treatment.

Q. These were members of the Executive Committee? A. Yes. Dr. Hacker quoted from the chart which was present at the meeting.

* * * * *

(88) Q. Now, the next time, then, after this particular meeting, that the Executive Committee considered this Kaval matter, that was September 10th, wasn't it, 1965? A. Yes.

Q. I mean as a group, formally. A. Yes.

Q. Now, on September 2nd or 3rd, 1965, Mr. Collins, did you receive a letter from me with reference to this investigation? A. I may have.

Mr. Likover: Mark this, please.

(Plaintiff's Exhibit 7 was marked for identification.)

The Witness: I again make my answer more definite, Mr. Likover. I did receive a letter from you dated September 2, 1965.

Q. All right; I will hand you this paper which has been marked for identification purposes as Plaintiff's Exhibit 7, which is a carbon copy of the letter. Will you (89) see if that is the same letter which you have in the file? A. Yes, it is.

Q. Would you read that letter, sir? A. Dated September 2, 1965. "Mr. J. W. Collins, Executive Director, Euclid-Glenville Hospital.

"Dear Mr. Collins: I am the attorney representing Dr. Samuel J. Pastorelle with reference to litigation arising out of certain actions of doctors at Euclid-Glenville Hospital.

"At present, I understand that the Executive Committee of the Medical Staff is conducting an investigation with reference to the discharge of Dr. Pastorelle and the withdrawal from the hospital of one John Kaval. It appears at this time that at least four members of the Executive Committee are defendants in a certain lawsuit presently pending in the Common Pleas Court of Cuyahoga County; and it would seem that any investigation conducted by the Executive Committee in which these doctors participate would be suspect.

"I am forwarding a copy of this letter together with the notification received from the Executive Committee to the Ethics Committee of the Academy of Medicine. It is my opinion that this investigation should be handled by an independent board of orthopedic surgeons or the Ethics Committee of the Academy of Medicine.

(90) "I am also enclosing to you a copy of the letter I am sending to Dr. Herbert H. Johnson, Chairman of the Ethics Committee.

"I would appreciate hearing your thoughts on the matter. Very truly yours, Sanford W. Likover."

Q. Did you make response to that letter, Mr. Collins?
A. Yes, I replied to you.

Mr. Likover: Will you mark that?

(Plaintiff's Exhibit 8 was marked for identification.)

Q. All right; I will hand you that paper which has been marked for identification purposes as Plaintiff's Exhibit 8. Will you read that one?

Mr. Meisel: I don't like to interrupt the question, but I do believe, if the documents are to be read to the jury, they should be read in sequence. We have one that Mr. Likover chose not to read to the jury. We have further documents read to the jury. It seems to me, in proper sequence—they should be read in sequence with their testimony in regard to them.

The Court: I think that is a matter to take up on redirect.

(91) Proceed.

The Witness: This is a letter from myself to Mr. Likover dated September 3, 1965.

"Dear Mr. Likover: The current considerations of the Executive Committee of the Medical Staff of Euclid-Glenville Hospital which affect your client, Dr. S. J. Pastorelle, are wholly internal and in accordance with responsibilities charged to that body by the governing board. These responsibilities cannot be abrogated because of external considerations such as litigation involving its membership, nor can the responsibilities be shifted to any outside third party or group. Should there be findings which indicate, in the opinion of the medical staff or the governing board, the need for involvement of other entities I would assume that such would be requested.

"Accordingly, I conclude that your request for 'Investigation of the matter' by a Committee or other appointive group from the Academy of Medicine is inappropriate."

* * * * *

(98) Q. On September 10th, the Executive Committee then took up the Kaval matter again; is that right? A. Yes, it did.

Q. In a specific meeting called for that purpose? A. Yes.

Q. And no other business was taken up at that meeting? That is on Joint Exhibit 19. A. No other business was transacted.

Q. Who was present at that meeting? A. Dr. V. T. LaMaida was presiding, Dr. J. L. Whitaker, John Messina, T. V. Parran, R. C. Waltz, E. B. Beery, G. C. Fanny, J. B. Price, V. D. Hacker, and Mr. Collins.

Q. May I interrupt you a moment, sir? Dr. Beery was a member of the Executive Committee? A. I can check that with some records I have. I believe he was taking Dr. Morabito's place. Neither Dr. Morabito or Dr. Beery was at the August 27th Meeting according to the minutes? A. In 1965 the Chief of the O.B. GYN was Dr. Morabito, Assistant, Emerson Beery. He was taking his place.

Q. Dr. Morabito was Chief of Obstetrics and Gynecology? A. Yes.

Q. He was not present at the August 27th meeting? (99) A. I believe not.

Q. Will you confirm that, sir? A. That is correct.

Q. At this meeting, it was at that meeting, Dr. Pastorelle appeared by invitation? A. Yes.

Q. Did any other doctor appear before the Executive Committee at this time to give a statement or discuss the treatment of the Kaval boy? A. No.

Q. This meeting was solely concerned with talking to Dr. Pastorelle? A. That was its purpose, yes, sir.

Q. When this meeting got underway, Mr. Collins,

were the statements of Dr. Alfred and Dr. Taylor made at the August 27th meeting read to him? A. That wasn't the procedure; they were not.

Q. In other words, at this time, at the beginning of this meeting, Dr. Pastorelle did not know what Dr. Alfred and Dr. Taylor said with reference to his treatment or their criticism of his treatment of the Kaval boy? A. He did not know at the beginning of the meeting.

Q. The meeting opened up with the statement from Dr. LaMaida which sets forth the duty of the Committee, in effect? **(100)** A. Yes, that is correct.

Q. After he made that statement, he asked Dr. Pastorelle to present his side of the case? A. Yes.

Q. At this point, Dr. Pastorelle did not know what statements had been made out of his presence by either Dr. Taylor or Dr. Alfred, or any statement made by members of the Executive Committee at the previous meeting? A. He had not been informed by this Committee.

Q. Had he been informed by anybody to your knowledge? A. Not to my knowledge, no.

Q. He was asked to present his side of the case? A. Yes.

* * * * *

(103) Q. What else did Dr. Pastorelle tell the Executive Committee? A. Dr. Pastorelle alleged—informed the Committee that one of the floor nurses had told the Kaval family they had the wrong orthopedic man.

Q. What else? A. He had told Mrs. Kaval after four weeks care of the case he would withdraw if she desired. The next day the case was transferred out of Euclid-Glenville Hospital.

Q. Then the Committee proceeded to question Dr. Pastorelle? A. Yes.

Q. At that time, had they informed Dr. Pastorelle of what Dr. Taylor and Dr. Alfred had reported at the previous meeting? A. They had not.

* * * * *

(142) By Mr. Likover:

Q. Now, Mr. Collins, when was the next consideration taken up by the Executive Committee of Dr. Pastorelle and the Kaval matter? A. The Executive Committee next met on September 17th. It was then it next discussed the matter.

Q. I will hand you what has been marked and admitted in evidence as Joint Exhibit 20. Was that the meeting? A. Yes.

Q. Are those the minutes of that meeting? (143) A. Yes.

Q. Who was present at the meeting? A. Drs. LaMaida, Whitaker, Messina, Parran, Waltz, Hacker, Beery, Fanney, Price and Mr. Collins.

Q. Was there any Executive Committee member, Dr. Morabito or Dr. Beery? A. Dr. Beery would have been in his place.

Q. At this time there were no assistants there? They were all people who took part in the previous meeting? A. That is right.

Q. With the exception of Dr. Beery, who was not at the first meeting? A. I believe that is right.

Q. At that meeting, was there any further statement or testimony taken from any of the people concerned outside of the Executive Committee? A. No other persons were present. No other testimony was taken.

* * * * *

(144) Q. Now, will you read to the jury, Mr. Collins, the minutes of September 17th? A. "Agenda items:

1. Previous meeting. Minutes of the previous meeting were summarized and approved.

"2. Continuation of business of previous meeting. Several letters were presented to the Executive Committee, that is, a letter from Mr. Likover to Mr. Collins was read, photostat attached and a letter to Dr. Johnston of the Ethics Committee of the Academy of Medicine was read, photostat attached. Mr. Cowan's reply to Mr. Likover's letter was read, photostated, attached, and the substance of a letter from Dr. Leo Walter, now Chairman of the Ethics Committee, to Mr. Likover, was also read, photostat attached.

"Then there followed a discussion of the type of procedures to be followed. It was debated whether the Executive Committee would take action on its own, or refer this matter to the Board for action. There was agreement that it is basically the responsibility of the Executive Committee to at least initiate action in this matter. Dr. LaMaida then read from the general principles of staff organization, as outlined by the American Medical Association. The Secretary then read the duties of the Executive Committee as charged by our own Constitution.

(145) "The matter of civil litigation against certain members of the Executive Committee by Dr. S. J. Pastorelle was discussed and there was unanimous decision that the involved members could not be released from their duties as Executive Committee members, and that they should participate in any action taken.

"Dr. R. L. Taylor's letter, photostat attached, stating refusal to serve on the same Emergency Room service with Dr. Pastorelle was read by the Secretary, as was his letter objecting to a taped, by Dr. Pastorelle, phone conversation. Also read was a letter from Dr. W. W. Tuckerman, photo-

stat attached, indicating refusal to serve with Dr. Pastorelle on the same Emergency Room service.

"It is the opinion of the Executive Committee that surreptitious taping of phone conversation with a colleague on the medical staff of this hospital is considered wholly improper, immoral and certain (sic) borders on being unethical. Furthermore, because it definitely interferes with normal professional relationship of the members of our medical staff, and because it is considered conduct detrimental to the proper medical administration of this hospital, the Executive Committee determines that the above considerations will be included in judging Dr. S. J. Pastorelle's future relationship with the (146) medical staff, and further that it agrees to acknowledge receipt of Dr. R. L. Taylor's letter, and to inform Dr. Taylor that it will receive attention by the Committee.

"'The Executive Committee summarized some of the matters pertaining to the Kaval case as follows:

"1. A poor chart. Consultant could not evaluate the case properly by chart perusal and that the progress notes were very meager.

"2. It was believed that there was not a complete attempt to use skeletal traction.

"3. The use of different metals was criticized.

"4. There was further comminution of the fracture at surgery.

"5. There was failure to note a fibular fracture even though reported by X-ray.

"6. No X-ray was taken prior to surgery, no X-rays between the third and twelfth of the month.

"7. There was apparent lack of rapport between family and attending physician.

"After three hours of study of the facts and opinions gathered concerning the conduct of Dr. S. J. Pastorelle, the Executive Committee agreed that:

"Any action of the Executive Committee concerning S. J. Pastorelle, M.D., is based upon an accumulation of complaints from patients, relatives of patients, personnel **(147)** and physicians, upon an accumulation of evidence or indications of improper medical judgment, care of patients, non-compliance with hospital and medical staff regulations or policies, plus the unsatisfactory management of the Kaval case, the surreptitious taping of the phone call with a member of the medical staff and lastly, is based upon knowledge of circumstances that have engaged previous Executive Committees in attempting to resolve similar past problems with Dr. Pastorelle and to prevent continuance of his irregular practices.

"It was further agreed that positive action must be taken at once to carry out the responsibility of the Medical Staff for maintaining a proper standard of care in this hospital. The Committee voted to recommend to the active staff that Dr. Pastorelle be removed from the Emergency Room fracture and orthopedic service prior to October 31, 1965, that he not be appointed to that service in 1966, unanimous decision; that it be required that he have formal written consultation on all major operative surgery, unanimous decision; and that he be reduced in rank from the active staff to the associate staff, two dissenters.

"It was further agreed that the entire problem be discussed with the Professional Matters Committee of the Board of Trustees in Joint Conference Committee **(148)** procedure, so as to inform that group of the problem and solicit its opinion and advice prior to presentation to the active staff for action. It was agreed that convening of

the Joint Conference Committee will be requested for October 6, 1965. It was agreed that a special meeting of the active staff should be arranged for October 13, 1965, to consider the above recommendations pursuant to Article IV, Section IV, paragraph B of the by-laws.

"A case concerning Mr. Trent, Room 413, was brought to the attention of the Committee. This was an amputation situation, and a number of questions were raised concerning the post-operative care. It was felt that there should be a study of the care rendered this patient. It was moved and passed that the Executive Committee require that Dr. Pastorelle arrange appropriate consultation to insure proper management. The Chief of Surgery was instructed to convey this requirement to subject physician.

"There being no further business, the meeting adjourned at 10:00 A.M. J. L .Whitaker, M.D., Secretary."

Amended to this as part of the minutes are a series of communications.

* * * * *

(253) Q. Then, on October 6th, 1965, the Joint Conference Committee met; is that right? A. That is correct.

Q. That is evidenced by Joint Exhibit 22? A. Yes.

Q. You acted as Secretary of that meeting? A. Yes, I did.

(254) Q. These minutes, as they are there, do not reflect the proceedings as such, do they? They are not verbatim record of that meeting in any way? A. They are not verbatim in any way; they are very broad, yes.

Q. The meeting commenced what time?

Why don't you read the minutes of that meeting, please? A. "Minutes of Joint Conference Committee Meeting, October 6, 1965. A meeting of the Joint Confer-

ence Committee was held in the conference room on Wednesday, October 6th at 4:00 P.M.

"Present were Messrs. R.C. Palmer, P.H. Torbet, S.F. Davis, W.R. Hough, W.F. Hecker, Drs. V.T. LaMaida, A.R. Miller, R.C. Walsh, J.L. Whitaker, V.D. Hacker, J. Messina, G.C. Fanney, J.B. Price, T.V. Parran, E.B. Beery. Also present was Executive Director Jay W. Collins, acting as secretary."

Q. The meeting commenced at 4:00 and closed at 6:30, is that right? A. Yes.

Q. Now, there are other papers attached to these minutes; is that right? A. Yes, there are.

Q. One of them includes the meeting notice? **(255)** A. Yes.

Q. One of them includes the agenda; correct? A. Correct.

Q. That probably has some of your notes on it? A. Correct.

Q. What was the agenda of that meeting, sir? Will you read that? A. "Joint Conference Committee, October 6, 1965, agenda:

I. Purpose.
   - A. Background of Dr. S.J. Pastorelle.
   - B. Current appraisal of Dr. Pastorelle.
   - C. Reason for Joint Conference.
   - D. Action of Executive Committee, September 17, 1965.
   - E. Definition of service.

II. 1963-64 Problems with Dr. Pastorelle.
   - A. Appointment of Committee.
   - B. Findings of Committee.
   - C. Action of Executive Committee. October 4, 1964.

III. Other pertinent considerations:

A. Civil suit.

B. Constitutional requirements.

IV. Questions directed to Professional Matters Committee: Future."

(256) Correct.

Q. All these matters were taken up, is that right, in a two and a half hour meeting? A. Yes, they were.

Q. Excuse me. What was the action of the Executive Committee on October 4, 1964? A. That was October 4, 1964?

Q. Yes, '64. A. I do not have a copy of the minutes of meeting with me. I cannot reply.

Mr. Jeavons: What date is that, Mr. Likover?

Mr. Likover: October 4, 1964. Do you have any minutes there?

By Mr. Likover:

Q. Do you have notes of the meeting of the Executive Committee of October 4, 1964? A. Mr. Likover, I am not sure of anything about that date whatsoever. I do not even know if this is typed correctly. I cannot answer your question. I do not know what October 4, 1964, was, at this moment.

Q. Will you look at the last page and see if that helps you with the correction of the date? A. No, this sheds no light on the matter.

(257) Q. On the copy of the agenda, didn't you change the date to May 12, 1964? A. I have paragraph 2-c; that reads, "Action of Executive Committee, 10-4-64."

I corrected that to read "Action of Executive Committee 5-12-64."

Q. This was an error? A. I had assumed it was a typographical error of no consequence.

Q. Then, after this two and a half hour meeting, there is one other paper attached to those minutes, aren't there? A. Yes.

Q. What is that? A. That was the item alluded to in the agenda—one E "Definition of service."

Q. Where did that definition come from? A. I cannot answer how this was prepared within the hospital. I have no recollection who prepared it.

Q. Will you read the definition of service? A. "Roster of Staff Physicians, competent in special fields of medicine, who are available to patients when necessary to patients who do not have a doctor, or whose doctor is not available at the time the patient is seen in the emergency room.

(258) "In addition, the service physician is required to care for out-patient department patients without charge and to conduct teaching rounds for house physicians."

Q. All right; was this at the Joint Conference Committee Meeting which included Trustees and members of the Professional Matters Committee among those who were listed as present? A. Yes.

Q. The doctors who are on the Executive Committee and the recommendations of the Executive Committee which are set forth on Joint Exhibit 20 were discussed; is that right? Would you check that? A. Yes, that is correct.

Q. Was that date not corrected to 5-12? A. That is incorrect.

Q. That says 5-12-64. A. It was the Minutes of the meeting of 5-12-64, that were read to the Trustees—Exhibit 20—September 17 is not correct.

Q. There was a meeting on 5-12-64, wasn't there? A. Oh, yes, here it is.

Q. I will hand you Joint Exhibit 15, Mr. Collins, which is the meeting of 5-12-64. A. Yes.

Q. These minutes were read to the Executive Committee—(259) I mean the Joint Conference Committee—the minutes were read to the Joint Conference Committee? A. That notation in my handwriting indicates what was read were the minutes of May 12th, Joint Exhibit 15. I do not want to testify to my recollection; I have to rely on that little note. It could have been May 12th or September 17th. The fact that it says "5-12" in my handwriting, which could—I am merely temporizing—both were pertinent.

Q. There is "September 17th," 1-D—Item 1-D on the agenda? A. Yes.

Q. Both these minutes were read? A. Yes. I am sure that was the case.

Q. This one had reference to a statement you have discussed before which you read with reference to the doctor placing the Executive Committee in an embarrassing position, and all the other situations involved in the Emergency Room; is that right? A. That is not the reason it was read.

Q. It was read to bring it up to date? A. Yes.

Q. To enlighten them as to what had happened at that time with reference to the doctor? Is that right? (260) A. Yes.

Q. Dr. Pastorelle was not invited to participate in that meeting, was he? A. No.

Q. This Professional Matters Committee—let me put it this way. Withdraw that.

Did anybody disagree with the action of the Executive Committee at the Joint Conference Meeting? A. There was no vote taken, there was no dissent voiced by any member present, to the best of my knowledge and recollection.

Q. In other words, while no vote was taken, nobody objected to the action or the recommendation of the Executive Committee? A. No, they did not object to this action.

Q. They were apprised of the fact by you and Dr. LaMaida and the other members of the Executive Committee? A. That is correct.

Q. The next step, of course, was another meeting of the Executive Committee, was it not, on October 11th? A. Yes, it was.

Q. That is evidenced by Joint Exhibit 23? A. Yes.

Q. What occurred at that meeting? Will you read the minutes, sir? **(261)** A. "Members present: Drs. LaMaida, Whitaker, Hacker, Messina, Beery, Fanney, Price, Parran, Mr. Miller, and Dr. Pastorelle by invitation.

"Dr. Pastorelle was invited to appear before the Executive Committee so that they might inform him of their proposed recommendations of September 17, 1965. Dr. Pastorelle appeared with a private stenographer, Mr. Bland and Dr. LaMaida with the approval of the Executive Committee informed Dr. Pastorelle and Mr. Bland that this meeting was private and that record of the meeting would be kept in regular fashion.

"The proposed recommendations of the Executive Committee of September 17th were then read to Dr. Pastorelle.

"There was discussion as to the reasons of these discussions. Dr. Pastorelle objected to the fact that he was not present when other doctors were queried regarding the management of some of his cases. Dr. Pastorelle was then reminded of the active staff meeting the following day for the purpose of presenting aforementioned recommendations of the Executive Committee.

"There being no further business, the meeting was adjourned. J.L. Whitaker, M.D., Secretary."

* * * * *

(262) Q. Then the active staff met the next day; is that right? A. Yes, October 12, 1965.

Q. That is evidenced by Joint Exhibit 24? A. Yes, that is Joint Exhibit 24.

Q. Will you read that? I won't look for my copy. Will you read the minutes of that meeting, sir? A. "Joint Exhibit 24: Agenda Items:

"1. Call to order. Dr. V.T. LaMaida opened the meeting at 8:10 A.M.

"2. Roll call. The roll was called by the secretary and a quorum was verified.

"3. Actions on recommendations of Executive Committee pertaining to a staff member.

"Dr. LaMaida asked Dr. S.J. Pastorelle to introduce Mr. Bland and tell his purpose in having the latter in this meeting. Dr. Pastorelle said he had engaged Mr. Bland to take minutes of the meeting, and further stated that at previous Executive Committee Meetings at which he, Dr. Pastorelle had been present, the Secretary took no minutes and that any minutes that appear were written after the meeting.

"Dr. LaMaida then affirmed that this was a private (263) meeting and that the staff had its own secretary and further informed the staff that Mr. Bland's attendance at the last special Executive Committee Meeting had been disallowed. He then asked for any opinion on the matter from members of the active staff. Dr. R.L. Taylor stated that he also felt that this was a private meeting and no other secretary was needed. Dr. William E. Forsythe moved that the staff approve the management of the meet-

ing thus far, and that the additional secretary is not necessary. This was seconded by Dr. W.W. Tuckerman and motion carried. Mr. Bland was then excused.

"Dr. LaMaida then read the purpose of the meeting from a prepared statement; this is attached."

Q. Would you read the prepared statement now, at this point? A. "Purpose of this Special Meeting of the Active Staff of Euclid-Glenville Hospital is to consider recommendations of the Executive Committee concerning Dr. S.J. Pastorelle.

"These recommendations were made after considerable time and effort had been spent by the Committee and after careful deliberation. These recommendations consist of three parts, the first two were passed unanimously.

* * * * *

(276) Q. All right, then, Mr. Collins, the matter, after (277) the vote of the active staff, was referred to the trustees; is that right?

The Professional Matters Committee? A. That is correct.

Q. Then you received a letter from me, did you not, dated October 14, 1965? A. I believe I did.

Mr. Likover: Will you mark this first, please?

(Plaintiff's Exhibits 15 and 15-A were marked for identification.)

Mr. Likover: 15 and 15-A, your Honor, letter dated October 14, 1965.

Q. I assume you have the original in your file, Mr. Collins? A. I think so.

Q. Will you read the copy? A. Dated October 14th, directed to me, Executive Director, regarding File No. 65093, Dr. S. J. Pastorelle.

"Dear Mr. Collins:

"As I have previously informed you, I am the attorney representing Dr. Samuel J. Pastorelle. It is my understanding that as a result of an investigation by the Executive Committee of the medical staff into the matter of one John Kaval, the Executive Committee made certain (278) recommendations to the active staff with reference to Dr. Pastorelle's status in the hospital. I have also been informed that the active medical staff has taken certain action with reference to Dr. Pastorelle's appointment and status as a result of the investigation conducted by the Executive Committee and its recommendations.

"You will recall that on September 2, 1965, I wrote to you with reference to this investigation and the position of certain members of the Executive Committee as defendants in a lawsuit brought by Dr. Pastorelle.

"It is my understanding that any recommendations of the active medical staff must be brought before the Board of Trustees of Euclid-Glenville Hospital Association. I am requesting that I be notified of the meeting at which this action of the active medical staff is brought before the Board. I am further requesting that I be permitted to bring a court reporter in order to make a record of the hearing before the Board of Trustees. I wish to call your attention to the fact that Dr. Pastorelle attempted to have a court reporter present at the meeting of the Executive Committee and the active medical staff, but was denied this privilege.

"I believe the action of the Executive Committee and the active medical staff with reference to Dr. Pastorelle was biased, arbitrary, prejudice and wrongful. I am (279) enclosing a copy of a letter to Mr. William R. Irrgang, President of the Board of Trustees, and I am forwarding a copy of this letter to him.

"If you have any further questions with reference to my position, I shall be pleased to discuss this with you or meet with you. I would also like to receive, at your convenience, a copy of the by-laws, rules and regulations of the Board of Trustees of the Euclid-Glenville Hospital Association.

"Thank you for your cooperation. Very truly yours, Sanford W. Likover."

Q. All right. Did you respond to this letter, Mr. Collins? A. Yes.

Q. Did you find it, because I can't find my copy at the moment.

Mr. Likover: Will you mark this?

(Plaintiff's Exhibit 16 was marked for identification.)

Mr. Likover: This is the letter of October 19th, your Honor.

The Court: 16th?

Mr. Likover: The 19th, Exhibit 16, October 19th.

(280) By Mr. Likover:

Q. Would you read that, Mr. Collins? A. Yes, sir.

To Mr. Likover under date of October 19, 1965, regarding File No. 65093, Dr. S. J. Pastorelle.

"Dear Mr. Likover:

"We acknowledge receipt of your letter under date of October 14, 1965 concerning Samuel J. Pastorelle, M.D.

"We do not consider it appropriate to have you present at the next meeting of the Board of Trustees as suggested in your communication. Very truly yours, Jay W. Collins, Director."

Carbon copy to Mr. Irrgang.

* * * * *

(281) By Mr. Likover:

Q. Now, I will hand you the paper which has been marked for identification purposes as Plaintiff's Exhibit 17, Mr. Irrgang's letter of October 20th. Would you read that, sir? A. "Sanford W. Likover, 711 Leader Building, Cleveland, Ohio.

"Dear Mr. Likover:

"I have your letter of October 14th, in which you ask for a hearing before the Board of Trustees on behalf of Dr. Samuel J. Pastorelle.

"It has not been the policy of the Board to grant such interviews. Your very truly, William Irrgang, President Board of Trustees, Euclid-Glenville Hospital."

Carbon copy to Mr. Collins.

* * * * *

(284) Q. Would you look at the attachment to Joint Exhibit 22 and would you tell me if the entire Professional Matters Committee was there? A. No, there were nine members of the Professional Matters Committee.

Q. How many were present on the 25th? A. Five.

Q. On the 25th? (285) A. Five.

Q. Now, Mr. Collins, Dr. Pastorelle was present at that meeting, wasn't he? A. He did appear at the meeting, yes.

Q. Was he present at the time his matter was taken up at the beginning—let me rephrase that.

Was he present there the first time his matter was taken up? A. It was not simultaneous. The Chairman discussed the matter and you appeared. Then Dr. Pastorelle was brought in. There was no discussion before he appeared.

Q. How long was Dr. Pastorelle kept waiting outside before he was called in? A. I have no recollection; I assume 15 or 20 minutes at most.

Q. Will you read to the jury the minutes of the Professional Matters Committee which is evidenced by Joint Exhibit 25? A. "Convened at 4:00 P.M., at Euclid-Glenville Hospital on October 25, 1965. Presiding was Mr. R. C. Palmer, Chairman. Also present were Messrs. Torbet, Davis, Hough, Dr. LaMaida and Mr. Collins.

"The Committee received a recommendation of the active staff that Dr. William Murawsky, 21801 Lake Shore Boulevard be appointed to the courtesy staff with privileges (286) in minor surgery and medicine. After discussion, this recommendation was unanimously approved.

"The Chairman stated the other purpose of the meeting was to hear Dr. S. J. Pastorelle before it considered the recommendation made by the Active Staff at its meeting on October 12, 1965.

"Mr. Torbet reported that Dr. Pastorelle appeared at the meeting with Attorney Sanford W. Likover, who asked to appear before the Committee. He was informed by Mr. Torbet that such appearance would be inappropriate and that only Dr. Pastorelle was invited to attend.

"Dr. Pastorelle stated that he did not get an impartial hearing on the charges against him, and that they were discriminatory, prejudiced, and biased. He stated that he had requested a hearing by a separate committee, and that such hearing had been refused. He claimed that he was convicted by a Kangaroo Court. He claimed that the Committee was made up of the wrong people. He stressed that he had not been present when other witnesses spoke before the Executive Committee. He stated that he had nothing else to say to this Committee of the Board. He was thanked for his appearance and excused.

"After detailed review of all facts and pertinent considerations, the Committee voted unanimously to:

(287) "A. Approve the recommendations of the Active Staff that, one, Dr. Pastorelle be removed from the emergency room fracture and orthopedic service prior to October 31, 1965, and that he not be reappointed to that service in 1966, and that two, it be required that he have formal written consultation before performing any major surgical procedures, and B, to recommend affirmative action on the Committee's proposal at the October 26th meeting of the Board of Trustees.

"The meeting adjourned upon motion at 6:15 P.M. Jay W. Collins, Acting as Secretary."

Q. Now, what time was Dr. Pastorelle called into this meeting? Does it show it there? A. No.

Q. How long was Dr. Pastorelle in the meeting? A. A relatively short time, at his own option, probably ten minutes, if I had to guess—15.

Q. What do you mean by "his own option"? A. He was asked if he had anything to say. He had prepared a statement. He reiterated it. He made the statement to the Committee of the Board.

Q. This Committee was the same one which met on October 6th and faced him with the proposal of the (288) Executive Committee which they had approved that day? A. That is substantially correct.

Q. The Board of Trustees met the next day? A. Yes.

Q. Was Dr. Pastorelle's request to have counsel appear conveyed to the Board of Trustees? A. I am sure it was, yes.

Q. I will hand you the minutes of the Board of Trustees of October 26th, which is evidenced by Joint Exhibit 4. Mr. Collins, will you read to the jury that section which pertains to the matter of Dr. Pastorelle? It starts at the bottom of page 2. The Trustees had other business before

they took up this matter—many items. Start with "Mr. Palmer." A. "Mr. Palmer, Chairman of the Professional Matters Committeee, reported that his Committee had met on August 25th and had taken action by adopting recommendations for the Board. The Committee recommended that the actions of the active staff with respect to Samuel J. Pastorelle, M.D. be approved and confirmed. At the active staff meeting held on October 12, 1965, it recommended approval to the Board of the following affirmative action:

> "1. That Samuel J. Pastorelle, M.D., be removed from Emergency Room fracture and orthopedic service prior to October 31, 1965, and that he not **(289)** be reappointed to that service in 1966; and
>
> "2. That it be required that Samuel J. Pastorelle, M.D., have formal written consultation before performing any major surgery.
>
> "Other action had been voted on by the active staff, and the staff by-laws require a two-thirds majority to accomplish such purpose. Mr. Palmer stated that the first action—removal from service—was adopted by the active staff by a vote of 41 to 3, and the second action requiring consultation was adopted by the active staff by a vote of 41 to 2.
>
> "Chairman Palmer reviewed in detail the course of study undertaken by the Staff Executive Committee concerning Dr. Pastorelle, and also related the numerous meetings and other efforts taken to solve the problems concerning this staff physician. There was full explanation of the civil suit Dr. Pastorelle has filed against certain members of the medical staff and his allegations concerning its effect on the current problems.

"Pertinent communications were read to the Board as well as excerpts from previous staff considerations and actions on this matter.

"Mr. Palmer stated that a letter had been received (290) from Dr. Pastorelle's attorney requesting that he be permitted to appear before the Board with respect to the case. Counsel for the Board had ruled that it was not a legal matter, but a question of hospital administration which was involved and that there was no procedure set up in the medical staff by-laws for an appearance before the Board of either Dr. Pastorelle or his lawyer. However, on recommendation of counsel for the hospital, the Professional Matters Committee had caused a letter to be written to Dr. Pastorelle stating that he could appear personally before the Committee at its meeting which was held on October 25th.

"Dr. Pastorelle did appear before the Committee and was permitted to express his views with respect to the actions taken by the active staff. He stated no pertinent facts regarding the actions, and his time was used by his accusations against the Executive Committee as being biased and prejudiced. He then stated that he had nothing further to say to the Professional Matters Committee. Specifically, he repeated the charges which were made in his letter of October 12, 1965, addressed to the active medical staff, which Mr. Palmer had read to the Trustees.

"Mr. Palmer said that after Dr. Pastorelle's appearance, the Committee deliberated at length and took official action by approving the recommendations of the (291) active staff and recommending that they be confirmed and approved by the Trustees.

"Whereupon, Mr. Palmer moved that the recommendations of the Professional Matters Committee confirming that:

> "1. Samuel J. Pastorelle, M.D., be removed from Emergency Room fracture and orthopedic service prior to October 31, 1965, and that he not be reappointed to that service in 1966, and

"2. That it be required that Samuel J. Pastorelle, M.D., have formal written consultation before performing any major surgery, be confirmed and approved by the Board. Mr. Hecker seconded the motion.

"A lengthy discussion took place among the trustees. It was pointed out that the Board of Trustees is charged with the duty of providing satisfactory patient care, which is the most important aspect of the operation of our hospital, and that the governing board is also charged with due care and diligence in the selection and maintenance of the Medical Staff. The Board felt that it must maintain at all times a satisfactory standard of medical care by a continuing supervision of the Medical Staff. A corollary to this duty is that of determining the privileges of members of the Medical Staff. The Board felt this duty could not be abdicated. The Board found that the procedure, as set (292) forth in the medical staff bylaws, had been followed, although the Board retained at all times the power and authority to reduce the rank or revoke the privileges of any medical staff member, under Article III, Section C of the Medical Staff by-laws.

"Whereupon a vote on the motion was called for and the Trustees unanimously agreed to the motion whereby the actions taken by a two-thirds vote of the active staff with respect to Samuel J. Pastorelle, M.D., at its meeting held on October 12, 1965, were confirmed and approved. The Executive Director was requested to notify Dr. Pastorelle and the active staff of this action."

* * * * *

(295) Q. Well, the only procedure referred to there is recommendation to the active staff; is that right? A. It said the procedure had been followed. It referred to the fact there had been innumerable investigations airing the problem.

Q. The procedure set forth that a person charged with irregularity is not allowed to have counsel? Is that set forth there? A. It is not set forth either yes or no.

Q. He is not allowed to hear statements against him; is that right? A. There is—it is not set forth in these regulations.

Q. There is no procedure which would not allow him to have a court reporter present to make a verbatim record? A. There is no mention of that.

Q. Wasn't there another problem with another doctor in (296) recent years and there was a court reporter made a record? A. Yes.

Q. That was in 1960? A. Yes.

Q. The hospital had allowed a court reporter to be used? A. I must quibble with that "had allowed." By mutual consent.

Q. But in this case there was no mutual consent? A. No.

Q. There was no mutual consent to allow the plaintiff to have counsel? A. No.

Q. What allegations and complaints were made by any person? A. The allegations and complaints were made by the duly constituted committee.

Q. Among those in the duly constituted committee were some of the defendants in the Brae-Burn case? A. Oh, yes.

Q. These matters were aired by the Executive Committee and the Professional Matters Committee before presenting them to the Active Medical Staff? A. It is always the custom.

Q. The recommendations of the Joint Conference Committee (297) was presented to the active staff? A. There was no recommendation made.

Q. But the recommendation of some of the Trustees

was made to the active staff? A. They were made aware of that, yes.

Q. They were aware there was general agreement by the Board of Trustees before they acted on it? A. I have no recollection that phrase was used.

Q. You were not at that meeting? A. No.

Q. Would it be a fair statement that the Professional Matters Committee were aware of this—was aware of those facts before they acted upon it? A. That would not be fair. Would you restate the question?

Q. Let me rephrase the question. Would it be a fair statement to say that the active medical staff was aware that some of the Trustees, at least, some members of the Professional Matters Committee, were in general agreement with the recommendations prior to the Medical Staff approving them? A. As I say, I was not present, but in the report to the active staff would have informed the active staff that there had been a Joint Committee Meeting and that the matter had been aired. There had not been violent disagreement, **(298)** because if there had been violent disagreement, it would have been presented differently to the staff.

Q. I am sure there were—

After the Trustees approved the recommendations of the active staff which approved the recommendations of the Joint Conference Committee and the Professional Matters Committee— A. Yes.

Q. You notified Dr. Pastorelle of that finding by letter dated October 27, 1965? A. Yes.

* * * * *

(308) Q. To your knowledge did Dr. Pastorelle have consultation in that particular case? A. What was the name of the case, Mr. Likover?

Q. Rosalie Orlando. A. My recollection is, there was a great deal of confusion regarding that particular case.

Q. Will you refer to Joint Exhibit 28, which is the Executive Committee Meeting of February 25th, 1966? A. Yes.

Q. At that meeting, there was substantial discussion with reference to that case? A. Yes.

Q. As a matter of fact, there was very little business taken up other than the treatment of that case? A. Yes.

Q. Was Dr. Pastorelle apprised that this matter was being taken up at this meeting? A. I have no knowledge that he was informed or not (309) informed on that point.

Q. Was Dr. Pastorelle called in to this meeting? A. He was not called in to this meeting.

Q. All right; will you read the minutes of that meeting, sir? A. "Members present: Drs. LaMaida, Whitaker, Hacker, Messina, Morabito, Fanney, Price, Depp, Waltz, and Mr. Collins.

"Agenda items:

"1. Previous meeting. The previous meeting was reviewed by the secretary.

"2. New business. Dr. LaMaida read to the Executive Committee his letter dated February 22, 1966, addressed to Dr. Pastorelle regarding a patient, Rosalie Orlando. Copy is attached."

Q. Will you read that copy at this point, sir? A. "Dear Dr. Pastorelle"—

Q. Dr. LaMaida's letter to Dr. Pastorelle? A. Under date of February 22, 1966. "Re: Orlando, Rosalie, Room 919, Hospital No. E-138338, Admitted: 2-4-66.

"In examining the chart of the above-mentioned patient on February 22nd, I noted that you had not written a single progress note. In fact, there was only one note

on the progress sheet, and this was written by a (310) house staff physician indicating that some sort of deprivement had been performed.

"Again, we are dealing with an inadequate chart, so that is impossible for any evaluating committee to determine the progress that this patient is making.

"Since it is impossible, after a two and one-half week period of time, to determine whether or not satisfactory progress is being made in this case, I am suggesting that you have formal written consultation in this case. Very truly yours, V. T. LaMaida, Chief of Staff."

Q. Did he have formal written consultation in that case, to your knowledge? A. May I see the minutes?

Q. You have them there.

Mr. Meisel: Are we reading the minutes?

Mr. Likover: He is.

Mr. Jeavons: Do you want to finish?

Mr. Likover: He is reading one point.

A. I do not know. A reply letter from Dr. Pastorelle to Dr. LaMaida was written.

Q. Will you read that letter? A. "February 23, 1966, re: Orlando, Rosalie, Room 919, (311) Hospital No. 138338, Admitted: 2-4-66.

"Dear Dr. LaMaida:

"I have complied with your suggestion that I obtain formal written consultation in this case of the above-mentioned patient by Dr. Dickman.

"Both Dr. Dickman and Dr. Hauser have been on a discussion of this patient although not formally, because concurrently, she has a brother in the hospital with neuropathic bone lesions of both feet, with the possibility that there may be a correlation between them as a familial condition.

"Mrs. Orlando has had a previous admission when both Dr. Wolkin and Dr. Frandylick were both consultants. Dr. Wolkin performed a lumbar sympathectomy and I subsequently performed a skin graft which has recently broken down again.

"In a recent article of the 'care of leg ulcers,' in the A.M.A. Journal there appeared the use in treatment of a combination of enzyme and antibiotic drugs. I have communicated with Mr. Albert Yondek, the local representative of Armour who manufactures this combination, and through his advice, I have instituted this treatment. Mr. Yondek has made a hospital visit and seen the results of the treatment in Room 919, and has subsequently called me by phone to give me further instructions from their research (312) department. His assistance has been invaluable because it has been more detailed than the A.M.A. Journal article.

"The chief detail of the therapy is that the edges must be debrided daily so that the ointment will be effective.

"I am trying to interest the intern on my service to do the dressings especially when I am not able to. The case is interesting in view of the excellent result I am getting. I think the intern ought to see his patient daily and so note progress. Isn't this the way it's done at other hospitals? Very truly yours, S.J. Pastorelle." Carbon copy to Dr. Dickman.

Q. Continue reading the minutes. A. "The Executive Committee was then briefed in some detail regarding the afore-mentioned case. The Committee was informed that there had been a period of two and a half weeks without progress notes written on the chart, that debridement was being attempted by the resident under Dr. Pastorelle's direction and that the resident refused to continue because the procedure was too painful, that the nurses

had asked Dr. Pastorelle to do this work since they could not perform this procedure. The Committee was then informed that consultation had been obtained with Dr. Dickman who felt that patient work-up and progress reports were inadequate and that response to therapy was (313) equivocal. It was also noted that Dr. Pastorelle had obtained consultation with a representative of a pharmaceutical house, and that said representative had seen patient and offered advice and the Committee deemed this an irregular procedure. Then Dr. Hacker then asked for a reading of the note from Mr. Collins to the Executive Committee relative to the granting of temporary privileges to Dr. Pastorelle. Said letter was read by the secretary and is attached."

* * * * *

(315) Q. All right. Now continue reading the minutes. A. "Dr. Hacker then reviewed the admissions of Dr. Pastorelle since the restrictions were placed, and suggested that it was time to re-evaluate the problem. After discussion, it was the consensus of opinion that there was evidence of management of cases inconsistent with standards of practice at E.G.H. Dr. LaMaida then remarked that he felt that a time for definite decision had come and that the following courses of action were open:

"A. Take no action;

"B. Grant leave of absence;

"C. Offer opportunity to resign; or

"D. Remove privileges.

"Then following further discussion as to the choices open, and after re-evaluating of the practices of Dr. Pastorelle since October 26, 1965, it was moved, seconded and passed that Dr. Pastorelle be removed from the medical staff of E.G.H.; that he be permitted to admit cases—"

Mr. Likover: "Admit no—"

A. "—Admit no cases between the date of action of (316) this staff and that of the Board of Trustees, and that the present cases in the hospital be attended by him under the complete supervision of the Chief of Surgery or his designated representative. Dr. LaMaida then asked that Dr. Dickman be called and report on the aforementioned consultation in the case of Mrs. Orlando. Dr. Dickman could not be present, but reported to Dr. LaMaida by telephone as follows:

"Dr. Dickman believed that Dr. Pastorelle has the ability to manage this case, but had not done so. He stated that Dr. Pastorelle's behavior seemed strange, and he, Dr. Dickman, was embarrassed by Dr. Pastorelle in the patient's presence. Dr. Dickman further stated that Dr. Pastorelle told him that he was obtaining consultation just to satisfy Dr. LaMaida and Dr. Hacker.

"Following this report, there was no further business, and the meeting was adjourned. J.L. Whitaker, Secretary."

* * * * *

(318) By Mr. Likover:

Q. I hand you this paper which has been marked for identification purposes as Plaintiff's Exhibit 23. Will you read that to the jury? A. Under date of February 28, 1966, to Dr. Pastorelle.

"On Wednesday, March 2, at 8:00 A.M. the Executive Committee will formally consider your activities at Euclid-Glenville Hospital. They will concern themselves with your conduct pursuant to the Board action of October 26, 1965.

"You are invited to attend this meeting which will be held in the hospital's conference room at the above hour. You may be prepared to discuss your hospital admissions since October 26, 1965. For the Executive Committee, J.L. Whitaker, Secretary."

Q. Isn't is a fact that the Executive Committee had already voted that Dr. Pastorelle should be removed from the staff? A. There was such a vote.

Q. It was approved by the Executive Committee? A. That was the vote of the Executive Committee meeting on February 25, 1966.

(319) Q. Will you read that portion of the minutes again? A. "Then following further discussion as to the choices open, and after re-evaluation of the practices of Dr. Pastorelle since October 26, 1965, it was moved, seconded and passed that Dr. Pastorelle be removed from the medical staff of E.G.H.; that he be permitted to admit no cases between the date of action of this staff and that of the Board of Trustees and that present cases in the hospital be attended by him under the complete supervision of the Chief of Surgery or his designated representative."

Q. Now, Mr. Collins, at that particular meeting there, on February 25th, was there a discussion of any other cases of Dr. Pastorelle's? A. I am almost sure there was a discussion of a case called the Hawk case. I would have to have the note on it, but it seems to me it was involved. It is mentioned in the minutes.

Q. That was the one where the needle broke? A. Needle left in body cavity after surgery.

Q. You say the needle was left in the body cavity? Isn't it a fact, sir, that was an ankle operation? A. The ankle is part of the body.

Q. But it is not the body cavity? A. We are quibbling. There is a hole, an incision.

(320) Q. I will hand you the minutes of the meeting of the Executive Committee on March 2, 1966, Joint Exhibit 29. I will ask you to read that to the jury, in the proper place. I don't want to prompt you. Read where the Exhibit is referring to that.

Would you read that? A. Can you tell me exactly where you want?

Q. Where there is a letter attached, so we get the continuity. A. "March 2, 1966. All members present except Dr. Waltz. Also present, Dr. Pastorelle, by invitation.

"Dr. LaMaida opened the meeting by reading a prepared statement indicating that the Executive Committee has continued its observation of case management and deportment of Dr. Pastorelle. Statement attached."

This is the statement which was read to Dr. Pastorelle at the beginning.

"After the expenditure of considerable time and thorough investigation of your deportment in the management of cases at Euclid-Glenville Hospital, the Executive Committee in May of 1964 called you before them and read a statement to you to which they unanimously agreed. This statement was concerned with affairs about the emergency room and was a warning in a way to you to maintain amicable relationships; otherwise you would be removed (321) from the fracture service roster.

"Last year the Executive Committee again felt compelled and responsible to review your professional activity, and after many meetings with you and other Staff Members decided to present the matter to the active staff.

"The active staff, in turn, by an overwhelming vote, 42 to 3, recommended to the governing board of this hospital that you be removed from staff service, and that consultation be required on your work in the hospital. The Board of Trustees approved the recommendation, and when it came time for staff reappointment, only offered temporary privileges with qualifications and a statement that these privileges would be reviewed.

"This Executive Committee is now carrying out its duties and would like to have you discuss your cases that you have had in the hospital since November, 1965."

Continuing reading the minutes:

"He reviewed the action of the Active Staff at its previous special meeting, and reviewed the action of the Board of Trustees granting only supervised temporary privileges to Dr. Pastorelle. Dr. LaMaida then indicated that poor chart work and questionable case management were still apparent and asked Dr. Pastorelle for comments. Dr. Pastorelle replied that he had no comments, that he (322) had promised himself that he would make no comments at this meeting since the members of the Executive Committee had already decided on a course of action.

Dr. Fanney then stated that he did not wish to accept the attitude of 'no comment,' and further stated that to make an intelligent decision he wanted to know why there were no progress notes and why the poor chart work, et cetera. Dr. Pastorelle again refused to comment and stated that he had previously asked to be heard before an 'unbiased committee' and that this course was refused. Dr. Pastorelle then commented on a break in surgical technique, uncovered nose, of which he was accused by Dr. Hacker, and stated that he had been insulted and that Dr. Hacker had indicated that he needed a rhinoplasty."

Q. Mr. Collins, do you know what a rhinoplasty is? A. It is a nose operation which changes the cartilage in the nose, changes the shape.

"Dr. Hacker then reviewed the episode and said that he considered this to be a major break in surgical technique and that his comment regarding such rhinoplasty was not meant to be derogatory or insulting, and that a statement is made to someone and the recipient may interpret it in a manner contrary to what was intended.

Dr. Pastorelle then added that all he wanted was to be left alone."

(323) This is in quotes—" 'I am an adult. I have been here 30 years and I want to practice medicine with dignity.'

"Dr. Pastorelle was asked whether he had any lawsuits. He replied in the affirmative, that there were three such suits in one year because 'some bastard in this hospital instigated it.' Dr. Pastorelle further explained that one case had come to Court.

"Dr. Hacker then rejoined that none of us can be left alone; all our charts are audited and our work is constantly observed by our colleagues.

"Dr. Pastorelle replied to Dr. Hacker, 'I am waiting for you.'

"He continued, 'You are getting these men into trouble. You have had the reputation of being a trouble-maker since you left St. Luke's.'

"Dr. LaMaida then interjected, 'Would you like a statement from Dr. Hacker concerning his reputation?'

"Dr. Pastorelle replied, 'No. He is a trouble-maker.'

"Dr. Fanney then returned to the discussion of chart work in the case of Mrs. Orlando, trying to evince some justification for its poor quality.

"Dr. Pastorelle asked, 'Why is there such a big deal about the Orlando case?'

(324) "Dr. Fanney replied, 'Because of a principle involved and principles are damned important.'

"Dr. Pastorelle then stated, 'You are just making trouble. I want to cooperate in every way possible, but I want to know what I'm supposed to do right now; otherwise I want to quit.'

"Dr. Pastorelle continued that one one would tell him what to do, no one would talk to him. Dr. LaMaida then

replied that it was difficult to talk to him because of his propensity for making tape recordings of everything that was said, and cited as an instance the recorded telephone conversation with Dr. Taylor. Dr. Pastorelle replied that he remembered the aforementioned conversation with Dr. Taylor, 'That louse.'

"Dr. LaMaida asked Dr. Fanney if Dr. Pastorelle had answered his question. Dr. Fanney replied that he had not.

"Dr. Pastorelle then asked to be excused; request granted by Dr. LaMaida.

"After the discussion, the Executive Committee formulated the following statement to be read before the active staff at the next regular meeting, 2, March, 1966:

"It is the unanimous opinion of the Executive Committee after untold hours of study and consideration that Dr. S.J. Pastorelle has consistently and knowingly demonstrated (325) disregard for the rules and regulations, policies and procedures of the hospital and its medical staff, has disharmonious and discourteous relations with enough of the operational staff so as to have created resentment and a disrespect, has frequently developed the dislike and distrust of his patients through tactics that are not befitting a professional man, has increasingly uncomfortable relationships with his colleagues because of his unwillingness or inability to maintain the customary standards of professional relationship and courtesy, has failed to demonstrate professional competence in his charts to the point that it frequently is impossible to tell what is done to a patient and why when things were done or were not done, has had an undue number of medical results which are at least doubtful and which cast serious doubt upon his judgment or ability or both, and has throughout the years failed in so many ways and on so

many occasions to meet the general standards that are expected for minimum performance on the medical staff of Euclid-Glenville Hospital, that there has been diminishing of the reputation of the staff and its individual members. It is the opinion of the Executive Committee that this accumulation of unsatisfactory performances, in addition to the significance of innumerable individual circumstances, any of which might well be considered grounds for revocation (326) of privileges, should at this time culminate in a termination of the staff relationship of said physician. J.L. Whitaker, Secretary."

* * * * *

(331) Q. I will hand you that paper which has been marked for identification purposes as Plaintiff's Exhibit 24. Will you read that to the jury? A. Dated March 3, 1966 directed to S. J. Pastorelle.

"It is my duty to inform you that, based upon a recommendation made by the Active Medical Staff at its meeting on March 2, 1966, your admitting and operating privileges are suspended herewith, and it is required that (332) you be supervised by the Chief of Surgery or a member of the Active Staff designated by him in the management of patients now in the hospital until such time as a final decision on the active staff recommendation is made by the Board of Trustees.

"It is contemplated that said decision will be undertaken at a meeting of the Board on March 22, 1966.

"Should you wish to appeal the above decision to the Board of Trustees, you may address such request to Mr. Robert C. Palmer, Chairman of the Professional Matters Committee, care of Central National Bank, Post Office Box 6179, Cleveland 1, Ohio. Very truly yours, Jay W. Collins."

Carbon copies to Robert C. Palmer and V. T. LaMaida.

Q. All right; then, as a result of your letter, was such notice sent to Mr. Palmer, to your knowledge? A. I believe so.

Q. Do you have a copy of it? A. No, I don't believe I do.

Q. Now, did you receive a communication from me in response to that letter? A. There are many letters in here. Are you referring to March 8th?

Q. Is that addressed to you, sir? A. It is addressed to me from you.

(333) Q. Yes, this is the letter that I am referring to, Mr. Collins.

Mr. Likover: Will you mark that?

(Plaintiff's Exhibit 25 was marked for identification.)

Mr. Likover: That is a letter dated March 8, 1966.

Q. All right, Mr. Collins; I will hand you this letter which has been marked for identification purposes as Plaintiff's Exhibit 25. Would you read that letter, sir? A. Addressed to Mr. Collins, dated March 8th.

"As you know, I have been representing Dr. Pastorelle with reference to the unwarranted actions of the active medical staff and the administration of the hospital towards him. He has referred to me your letter of March 3, 1966, revoking his admitting and operating privileges.

"I find nothing in the articles for the regulation of Euclid-Glenville Hospital Association or the by-laws, rules and regulations of the medical staff which grants to you the authority to take such action.

"Therefore, I am requesting the immediate revocation of the order until such time as the appeal of Dr. Pastorelle

(334) to the Board of Trustees is heard. Very truly yours, Sanford W. Likover."

Carbon copies to Paul Torbet and Robert C. Palmer.

Q. Did you consult Mr. Torbet with reference to this—with reference to my letter? A. Yes, after receiving your letter, I did.

Q. Did you respond to my letter, or did Mr. Torbet respond, if you know? A. I know Mr. Torbet responded to it. I do not have any recollection to the date.

Mr. Likover: Will you mark that?

(Plaintiff's Exhibit 26 was marked for identification.)

Mr. Likover: That is a letter dated March 11, 1966.

Q. I will hand you a paper which has been marked for identification purposes as Plaintiff's Exhibit 26, Mr. Collins. Will you read that letter to the jury? Exhibit 26? A. Addressed to Sanford W. Likover from Paul Torbet. In regard to S. J. Pastorelle.

"I have your letter of the 8th of March, concerning Dr. Pastorelle and his suspension from privileges at Euclid-(335) Glenville Hospital. I have carefully considered the contents of the letter and have investigated the actions which have taken place at the hospital leading to his suspension from privileges.

"First, I must state there is no appeal provided for in the medical staff constitution and by-laws as you seem to interpret from the statement made by Mr. Collins in his letter to Dr. Pastorelle, dated March 3rd. The word 'appeal' used by Mr. Collins in his letter accordingly cannot refer to a right enjoyed by Dr. Pastorelle and certainly Mr. Collins cannot create one. I believe he used the word in the sense that he, Mr. Collins, was without any power

or authority in the matter of consideration by the Board of Trustees, and that the doctor could communicate to Chairman of the Professional Matters Committee any plea or importunity with respect to the action taken by the active medical staff.

"While there is no provision for hearing on such action, on the occasion of the previous action taken against Dr. Pastorelle, he was permitted to appear before the Professional Matters Committee. Whether he will be permitted to appear on this occasion will be a matter for such committee to determine, as there is no legal requirement of the committee.

"The action taken by the active medical staff, as (336) well as that of Mr. Collins, was in promotion of the welfare of the hospital and its patients. In today's modern legal concepts, a hospital owes a duty to all of the patients who enter it for relief. It is the primary duty of its governing body to provide satisfactory patient care. The administrative officers likewise perform such duty, so that the basic purpose of the hospital can be accomplished. I believe Mr. Collins accordingly acted in the best interest of the hospital, and I respectfully decline to influence his judgment to reverse his decision as set forth in the letter dated March 3rd. Very truly yours, Paul H. Torbet."

Carbon copies to Jay Collins and R. C. Palmer.

Q. Now, the Professional Matters Committee met on March 22nd, did it not? A. Yes.

Q. That is evidenced by Joint Exhibit 31? A. Yes.

Q. Dr. Pastorelle appeared with counsel? A. I have a recollection that he did. It is not mentioned in the minutes.

Q. Do you have any copies of any communication between Mr. Palmer and Mr. Likover? A. Yes.

Q. Do you have those? (337) A. Yes, I have a communication. I do not have the one you wrote to him; I have the one he wrote to you.

Q. May I see that one?

Mr. Likover: Will you mark those?

(Plaintiff's Exhibits 27 and 27-A were marked for identification.)

Mr. Likover: 27 and 27-A, letter dated March 18, 1966, your Honor.

Q. I hand you these papers which are stapled together, marked Plaintiff's Exhibits 27 and 27-A. Will you read that? A. A communication to Sanford W. Likover, Esq., under date of March 18th, 1966, from Robert C. Palmer.

"As Chairman of the Professional Matters Committee of the Board of Trustees of Euclid-Glenville Hospital, I am pleased to acknowledge receipt of your letter of March 8, 1966, regarding S.J. Pastorelle, M.D.

"As related in Mr. Collins' letter of March 3, 1966, addressed to Dr. Pastorelle, of which I received a copy, action was taken by the active medical staff at its meeting on March 2, 1966, recommending revocation of Dr. Pastorelle's privileges at Euclid-Glenville Hospital. Mr. Collins as director of the hospital, gave notice to your client that such suspension of privileges would be effective at once pending final action of the Board of (338) Trustees.

"The Board of Trustees as governing body of the hospital, must take the final action with respect to the revocation of privileges and I assume that the Board will have such matter to be considered at its regular meeting. This is in spite of the fact that the next regularly scheduled meeting is on March 22nd, 1966, and follows the annual meeting of the Euclid-Glenville Hospital Association.

"It is my understanding of the by-laws and regulations of the medical staff that they provide for no appeal on the part of Dr. Pastorelle. While Dr. Pastorelle does not have the right to appear before the Board, I am pleased to invite him to appear before the Professional Matters Committee which has scheduled a meeting at the hospital at 4:30 P.M. on March 22nd, 1966. This is following a courtesy which this Committee has previously accorded your client and on this occasion as well we must insist that his appearance be without his attorney and without a court reporter.

"I should appreciate your conveying this invitation to your client under these conditions and should appreciate your notifying me prior to the meeting of his interest in appearing. Very truly yours, Robert C. Palmer."

Blank carbon copies to Jay W. Collins, and Paul H.
(339) Torbet.

Q. All right. The meeting was held on March 22nd, wasn't it? A. Yes.

Q. I hand you Joint Exhibit 31 and I will ask you to read that. A. These are the minutes of the Professional Matters Committee Meeting.

"A meeting of the Professional Matters Committee was held Tuesday, March 22, 1966, at 4:30 P.M. in the Conference Room. Those present were Messrs. Palmer, Chairman, Torbet, Smith, Wilson, Dickey and Collins; Drs. LaMaida, Miller, and Waltz"—the latter by invitation.

"The Committee voted to recommend the granting of a leave of absence to Dr. J. H. Dempsey, based upon his request and the recommendation of the Active Staff.

"The Chairman read the correspondence regarding the suspension of Dr. S. J. Pastorelle on March 3, 1966,

and the subsequent letters between the doctor's attorney and the members of this committee and the director. The Chief of Staff and the director discussed in detail the events which took place since the last meeting of the Board, at which the Pastorelle matter was discussed.

"Mr. Torbet and Mr. Palmer read all the communications to and from attorney Sanford W. Likover.

(340) "At 5:00 P.M. Dr. Pastorelle was invited to enter the conference room and he appeared at that time.

"The Chairman had explained that the purpose of this meeting was to hear any comments the physician might have which would bear on the recommendations of the active staff, and which should be known by the Committee prior to arriving at its decision on the staff recommendations.

"The doctor replied, 'I am sure you know my comments; I sent them to the Executive Committee. If you want me to say more, I will want legal counsel present.'

"The Chairman replied, 'We want to hear what you have to say, if you wish to say it. It is not our practice to have legal counsel present.'

"Dr. Pastorelle asked, 'Didn't Dr. LaMaida tell you everything you should know?'

"Mr. Torbet replied, 'Your appearance here is a courtesy being extended to you. We wish to hear you out.'

"Dr. Pastorelle stated, 'I have civil rights. Any change in my status will affect my right to make a living. I have been here since 1935, and now you are giving me the boot. My only appeal is to have legal counsel and a court stenographer. Minutes of meetings like this are not any good.'

"He then asked Drs. Miller and Waltz and Mr. Torbet **(341)** if he had ever hurt them. He stated, 'My defense is that I have a legal and moral right to a proper trial.'

"He further said, 'If a doctor falls behind in his charts, the by-laws say, 'Suspend'—not 'kick out.'

"There was a brief discussion of the by-law provision concerning the suspension for failure to complete records and it was generally agreed that the provision of the by-law was not germane to the matter under consideration. Mr. Collins told Dr. Pastorelle that he should give the trustees a chance to hear what he thinks about the actions of the active staff and what he thinks the trustees should do, as well as any defense information which should be known by the trustees. He stated that he and the Chief of Staff had tried to relate faithfully every aspect of the incidents to date, but it would be helpful to the trustees to hear Dr. Pastorelle's report on all matters.

"Dr. Pastorelle replied, as follows: 'I have been denied the right of legal counsel. I have not been treated as as have other doctors, and if the staff's action is approved, I will be denied the right to practice medicine by an arbitrary, prejudiced and illegal action.'

"Mr. Palmer stated that Dr. Pastorelle's remarks would be conveyed to the Board of Trustees. The doctor asked to be informed of the Committee's action, but was **(342)** advised that it would make a recommendation to the Board. Dr. Pastorelle asked for information tonight as to the Board's action, and was informed that he would receive it in the regular and normal manner, that being from the Executive Director.

"The physician, upon stating that he had nothing further to say, was excused at 5:20 P.M.

"There was an extensive discussion of the reasons for the actions of the active staff, including review of the minutes of the Executive Committee pertaining to the matter at hand, and also the minutes of the last active staff

meeting. The Secretary of the medical staff, Dr. Whitaker, entered the meeting to present these minutes in person.

"The following action by the Executive Committee on February 25, 1966 was read to the Committee: 'After re-evaluation of the practices of Dr. Pastorelle since October 26, 1965, it was moved, seconded, and passed that Dr. Pastorelle be removed from the medical staff of Euclid-Glenville Hospital; that he be permitted to admit no cases between the date of action of this staff and that of the Board of Trustees, and that present cases in the hospital be attended by him under the complete supervision of the Chief of Surgery or his designated representative.'

(343) "The following action by the active staff on March 2, 1966, was read to the Committee: 'The motion was made and seconded to approve the recommendation of the Executive Committee that Dr. S. J. Pastorelle be removed from the medical staff of Euclid-Glenville Hospital. That he be permitted to admit no cases between the action of this staff and that of the Board of Trustees and that present cases in the hospital be attended by him under the complete supervision of the Chief of Surgery or his designated representative.' The result of closed ballot was 33 for the motion, 7 against the motion and it was declared passed.

"Dr. Whitaker reviewed all comments made by members of the staff at the March 2nd meeting. The vote to recommend withdrawal of Dr. Pastorelle's privileges was 33 for and 7 against. There was then extensive discussions and review of every aspect of the Pastorelle situation. The Professional Matters Committee voted to recommend to the Board approval of the active staff recommendation that Dr. Pastorelle's privileges be withdrawn, effective upon notification from the Board of Trustees through the Ex-

ecutive Director, and to recommend to the Board that it confirm and ratify the action of the Executive Director in suspending Dr. Pastorelle as of March 3, 1966. The vote upon the motion was unanimous. (344) The meeting adjourned at 6:25 P.M. Respectfully submitted, Jay W. Collins, Acting Secretary."

* * * * *

QUESTIONS OF LAW PRESENTED TO THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

I. Private hospitals which participate in Hill-Burton joint Federal and State programs for allocating aid to hospital facilities are sufficiently involved with state action to be within the Fourteenth Amendment prohibitions against depriving the plaintiff-appellant of his rights under the due process and equal protection clauses.

II. The failure of the defendants to allow the plaintiff-appellant to confront his accusers, to inform plaintiff-appellant of charges against him, and to allow him to have counsel present during hearings was a violation of due process and natural justice.

III. Where natural justice and due process has been denied to a medical member of a non-profit hospital staff, and during the course of such denial, he was deprived of his right and privilege to practice medicine in said hospital, such member has an action for damages.

IV. The trial court may not determine ultimate facts upon the determination of which different minds might reasonably come to different conclusions.

QUESTIONS OF LAW PRESENTED TO THE SUPREME COURT OF OHIO.

PROPOSITION OF LAW NUMBER 1:

A private, non-profit hospital which received part of its funds from public sources and through public solicitation, which received tax benefits because of its non-profit and non-private aspects, is a "private hospital" in the sense that it is non-governmental, but it is in no position to claim immunity from public supervision and control because of its private nature. The power of the staff of such a hospital to pass on staff membership applications is a fiduciary power, which must be exercised reasonably and for the public good.

PROPOSITION OF LAW NUMBER 2:

Any rule or regulation of a professional society which has the effect of depriving an individual of an opportunity of earning a livelihood in a profession in which he is duly licensed by the state is subject to judicial scrutiny to determine whether it is arbitrary and unreasonable.

PROPOSITION OF LAW NUMBER 3:

A hospital serving important public function and financed partly by public funds is sufficiently linked with state boards acts in regard to admission and cancellation of staff members to be subject to the limitations of the Fourteenth Amendment, United States Constitution.

PROPOSITION OF LAW NUMBER 4:

Private hospitals which participate in Hill-Burton joint federal and state program for allocating aid to hospital facilities are sufficiently involved with state action to be within the Fourteenth Amendment prohibitions against depriving the plaintiff-appellant of his rights under the due process and equal protection clauses.

PROPOSITION OF LAW NUMBER 5:

Whether "interest of substance" which accrues to a member of a professional association is called property right, contract right or merely member's relation to association, wrongful expulsion from voluntary professional association has such serious effect on the ability of a professional man to successfully pursue his livelihood that such interest is a judicially protected interest.

PROPOSITION OF LAW NUMBER 6:

Although a physician has no constitutional right to practice his profession at a private hospital, constitutional requirements of due process and equal protection do place limitations on the manner in which one can be excluded from such practice.

PROPOSITION OF LAW NUMBER 7:

Whenever there is substantial interest, other than merely the right to practice in a hospital, involved in the cancellation of privileges of a physician, such privileges may be cancelled neither on arbitrary grounds nor without procedure calculated to determine whether legitimate grounds do exist. Where the articles for regulations of a hospital association and the rules and regulations and by laws of its medical staff as to procedure for the reduction in rank or revocation of all privileges of any staff member, except for non attendance at meetings, the law requires reasonable regard for due process and natural justice.

PROPOSITION OF LAW NUMBER 8:

Whether the right to practice medicine be classed as property right, strictly speaking, or as a mere privilege, it is not material; for whichever name be given it, is a

valuable right which cannot be taken away without due process of law, the essential elements of which are notice and opportunity to defend.

PROPOSITION OF LAW NUMBER 9:

Where a physician has not been given notice; had not been allowed to confront his accusors and had not been informed of the charges against him, such physician has not received a fair hearing or hearing meeting requirements of due notice upon questions of expulsion for conduct injurious to the hospital association and medical staff.

PROPOSITION OF LAW NUMBER 10:

Where natural justice and due process is denied to the medical member of a non-profit hospital staff and during the course of such denial he was deprived of his right and privilege to practice medicine in said hospital, such member has an action for damages.

PROPOSITION OF LAW NUMBER 11:

Failure of the trustees of the hospital and the medical staff to allow the physician to confront his accusors, to inform the physician of the charges against him, to give adequate notice of hearing and a full opportunity to examine and cross examine all material witnesses, is a violation of due process and natural justice.

PROPOSITION OF LAW NUMBER 12:

The trial court may not determine ultimate facts upon which a determination of which minds might reasonably come to different conclusions.

APPENDIX C.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

CONSTITUTION OF THE UNITED STATES.

Amendment XIV, Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE, TITLE 42.

§ 291. Congressional declaration of purpose.

The purpose of this subchapter is—

(a) to assist the several States in the carrying out of their programs for the construction and modernization of such public or other nonprofit community hospitals and other medical facilities as may be necessary, in conjunction with existing facilities, to furnish adequate hospital, clinic, or similar services to all their people;

(b) to stimulate the development of new or improved types of physical facilities for medical, diagnostic, preventive, treatment, or rehabilitative services; and

(c) to promote research, experiments, and demonstrations relating to the effective development and utilization of hospital, clinic, or similar services, facilities, and resources, and to promote the coordination of such re-

search, experiments, and demonstrations and the useful application of their results.

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties.

* * * * *

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set

forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

TABLE OF CONTENTS.

Citations to Opinions Below ---- 2

Jurisdiction ---- 2

Questions Presented ---- 3

Constitutions and Statutes Involved ---- 3

Statement of the Case ---- 4

Reasons for Granting the Writ ---- 10

I. The decision of the Ohio Supreme Court conflicts with the decisions of the federal courts of appeals as to whether acceptance of Hill-Burton funds by private, non-profit hospitals carries with it the obligation to observe federal constitutional mandates ---- 10

II. The decision of the court below conflicts with the decisions of the federal courts as to constitutionally required minimum elements of due process essential to an administrative evidentiary hearing 12

III. The court below clearly erred in holding that the Civil Rights Act of 1871 was inapplicable to the instant case ---- 15

APPENDIX.

(Separately Printed.)

APPENDIX A. Opinions and Judgments Below:

Opinion of the Court of Common Pleas of Cuyahoga County, Ohio ---- 1

Opinion of the Court of Appeals of Cuyahoga County, Ohio ---- 5

Orders of the Supreme Court of Ohio ---- 8

APPENDIX B. Portions of the Record Below Wherein Evidence of Non-Compliance with Federal Constitutional Requirements are Shown:

Excerpts from Record of the Court of Common Pleas of Cuyahoga County, Ohio 9

Questions of Law Presented to the Court of Appeals of Cuyahoga County, Ohio 57

Questions of Law Presented to the Supreme Court of Ohio 58

APPENDIX C. Constitutional and Statutory Provisions:

Constitution of the United States. Amendment XIV, Section I 61

United States Code, Title 42:

§ 291. Congressional declaration of purpose ... 61

§ 1983. Civil action for deprivation of rights ... 62

§ 1985. Conspiracy to interfere with civil rights—Preventing officers from performing duties 62

TABLE OF AUTHORITIES.

Cases.

Birnbaum v. Trussell, 371 F.2d 672 (2nd Circ. 1966) ---------- 13, 14, 16

Chiaffitelli v. Dettmer Hospital, Inc., --- F.2d --- (6th Circ. 1971) [No. 20390; decided and filed, Jan. 5, 1971] ---------- 11

Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (E.D. Pa. 1970) ---------- 11, 13, 14, 16

Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967) aff'd 415 F.2d 1077 (8th Circ. 1969) ---------- 13

Goldberg v. Kelly, 397 U.S. 254 (1970) ---------- 12, 14

Jones v. Snead, 431 F.2d 1115 (8th Circ. 1970) ---------- 13

Meredith v. Allen County War Memorial Hospital Commission, 397 F.2d 33 (6th Circ. 1968) ---------- 13, 15, 16

Orr v. Trinter, --- F. Supp. --- (S.D. Ohio 1970) --- 14

Sams v. Ohio Valley General Hospital Association, 413 F.2d 826 (4th Circ. 1969) ---------- 10, 11

Scoggin v. Lincoln University, 291 F. Supp. 161 (W.D. Mo. 1968) ---------- 14

Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Circ. 1963), cert. den. 376 U.S. 938 (1964) ---------- 10, 11

Constitution and Statutes.

Constitution of the United States:
Amendment V ---------- 10, 11, 12
Amendment XIV ---------- 3, 9, 10, 11, 12
28 U.S.C. 1257(3) ---------- 2
42 U.S.C. 291 ---------- 3, 11
42 U.S.C. 1983 ---------- 3, 12, 15
42 U.S.C. 1985(3) ---------- 3, 15

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. _____.

S. J. PASTORELLE,
Petitioner,

vs.

J. W. COLLINS, *et al.*,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in the above entitled case on December 23, 1970.

---

* List of all respondents:

Jay W. Collins	Karl S. Alfred
William Irrgang	Emerson B. Beery
Rolland F. Smith	Edward B. Depp
Paul H. Torbet, Esq.	Frederick Dickman
Chester D. Christie	William E. Forsythe
Robert W. Cornell	Hudson D. Fowler, Jr.
J. F. Davis	Vernon D. Hacker
William F. Hecker, Esq.	Vincent T. LaMaida
William R. Hough	John Messina
Robert C. Palmer	Alexander R. Miller
Paul Priest	Theodore V. Parran
Kenneth G. Reider	L. J. Perme
Kenneth J. Sims	Jay B. Price
William H. Wilson	W. W. Tuckerman
R. R. Pierce	John L. Whitaker
William H. Martin	Paul S. Dickey
Louis A. Vogel	Robert C. Waltz
Grafton C. Fanney	J. George Furey
Joseph F. Morabito	Richard L. Taylor

CITATIONS TO OPINIONS BELOW.

The oral opinion of the Trial Court Judge is unreported and is printed in the Appendix hereto, page 1.* The opinion of the Court of Appeals for the Eighth Judicial District of Ohio is unreported and is printed in Appendix at page 5. The decision of the Supreme Court of the State of Ohio is unreported and printed in Appendix page 8.

JURISDICTION.

The judgment of the Supreme Court of the State of Ohio was entered on December 23, 1970 (Appendix page 8). An extension of time for the filing of this petition for a writ of certiorari was granted by the Honorable Potter Stewart on March 24, 1971. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (3). Since the decision of the Ohio Supreme Court conflicts with the decisions of the Federal Courts of Appeals as to whether the acceptance of Hill-Burton Funds by a private non-profit hospital carries with it the obligation to observe federal constitutional mandates and the decision of the Ohio Supreme Court conflicts with the decisions of this Court and other Federal Courts as to the constitutionally required minimum elements of due process essential to an administrative evidentiary hearing.

---

* For convenience the Appendix has been printed under separate cover.

QUESTIONS PRESENTED.

Whether receipt of funds under 42 U.S.C. 291 (Hill-Burton Funds) by a private non-profit hospital carries with it the obligation to observe the federal constitutional mandates in the termination of an appointment of a physician on its medical staff.

Whether the federal constitutional mandates require minimum elements of due process and natural justice by a private hospital receiving federal funds in terminating the appointment of a physician on its medical staff.

Whether an action lies under 42 U.S.C. 1983, 1985 (3) against the trustees and various committees of a private hospital receiving funds under 42 U.S.C. 291 for failing to comply with the federal constitutional mandates before terminating the privileges of a physician on its medical staff.

CONSTITUTION AND STATUTES INVOLVED.

The constitutional provision involved is Amendment XIV of the Constitution of the United States (Appendix page 61).

The statutory provisions involved are 42 U.S.C. 291 and 42 U.S.C. 1983 and 1985 (3) (Appendix page 62).

STATEMENT OF THE CASE.

The petitioner in this action is a physician, duly licensed to practice medicine in the State of Ohio for more than thirty years. The respondents are either Trustees, the Executive Director, or physicians who are or who have been officials of the medical staff of Euclid Glenville Hospital, or are members of the medical staff of Euclid Glenville Hospital. The petitioner has been engaged in the practice of medicine for more than thirty years and was a member of the active staff of Euclid Glenville Hospital from 1946 to March 22, 1966.

In July, 1965, the respondent Dr. Hacker (Chief of Surgery) was instructed by the respondents Dr. Lamaida (Chief of Staff) and Mr. Collins (Executive Director) to commence investigation into the circumstances surrounding the transfer of a certain patient of the petitioner to another Doctor and another institution. Petitioner received notice of this investigation. Shortly afterwards, the respondent members of the Executive Committee commenced a similar investigation upon the urging of the respondents Hacker and Lamaida. The Rules of the medical staff, which governed the activities of the medical staff and the Executive Committee were silent upon procedures to be used in any investigation (Record pages 295-6).

The Executive Committee of the medical staff commenced an ex parte investigation with reference to the treatment of said patient and, at a meeting held on August 27, 1965, the respondents, Drs. Taylor and Alfred, charged the petitioner with gross carelessness, unprofessional and unskilled treatment of said patient, the petitioner not being present at this meeting (Record page 75).

On September 2, 1965, the petitioner through his Counsel, requested that an independent committee of physicians not connected with the hospital conduct the

investigation, which request was refused (Record pages 88-91).

The petitioner was invited to attend an Executive Committee Meeting on September 10, 1965. After a statement of the purpose of the meeting by the Chairman, the petitioner was asked to defend himself without having been informed of the aforesaid statements and charges made by the respondents Alfred and Taylor (Record pages 91-100, 103).

On or about September 17, 1965, those respondents who were members of the Executive Committee, outside of the presence of the petitioner, discussed the charges and entered into its records false, defamatory and untrue charges that the petitioner had exercised improper professional judgment, care of patients and non-compliance with the hospital staff regulations and policy. The Committee voted to recommend to the Active Staff that the petitioner be removed from the emergency room fracture and orthopedic service prior to October 31, 1965, that the petitioner not be appointed to that service in 1966, that it be required that petitioner have formal written consultation on all major operative surgery, and that petitioner be reduced in rank from active staff to the associate staff (Record pages 142-143; 144-148).

On October 6, 1965, the respondent Executive Committee met with the Professional Matters Committee of the Hospital Trustees in Joint Conference Procedure. The petitioner was not present at this proceeding nor was he notified nor invited to this meeting. The Members of this Joint Conference Committee (composed of members of the Executive Committee who had voted for the recommendations on September 17, 1965, and the Trustee members of the Professional Matters Committee) concurred in the recommendation of the Executive Committee (Record pages 253-261).

The petitioner was called to a meeting of the Executive Committee on October 11, 1965, which meeting the petitioner attempted to record by having a Court Reporter present to make a transcript of said meeting. The use of a Court Reporter was denied to the petitioner and the Executive Committee informed the petitioner that there was urgency for this meeting because a Meeting Notice had been sent to the Active Medical Staff for October 12, 1965, to consider the charges against the petitioner and the petitioner's status. At this meeting (October 11, 1965) no witnesses or Counsel were allowed and the proposed recommendations of the Executive Committee of September 17, 1965, were read to the petitioner (Record pages 260-261).

The Active Medical Staff of Euclid Glenville Hospital was called to a special meeting on October 12, 1965, for the purpose of receiving the recommendations of the Executive Committee of the Active Medical Staff and the Professional Matters Committee of the Trustees of the hospital. The petitioner again attempted to have a Court Reporter present to make a transcript of the meeting and this was again denied (Record pages 262, 263).

Upon receiving the recommendations of the Executive Committee and the Joint Conference Commttee, the Active Medical Staff approved the recommendations of the Executive Committee of the Medical Staff, which called for the removal of the petitioner from the fracture service and also provided that the petitioner be required to have formal written consultation on all major surgical cases and rejected the other recommendations.

This action of the Active Medical Staff was referred to the Professional Matters Committee of the Board of Trustees for recommendation to the Board of Trustees. The Professional Matters Committee was composed of the same individual Trustees who were members of the Joint Con-

ference Committee on October 6, 1965 (Record pages 276-277).

On October 14, 1965, petitioner, through his counsel, requested that the petitioner be allowed to have his counsel and a Court Reporter present at the meeting of the Professional Matters Committee and of the Board of Trustees. This request was denied (Record pages 277, 280 and 284).

The petitioner was required to appear before the Professional Matters Committee without counsel, although his counsel was present at the hospital with a Court Reporter, in spite of the fact that the hospital's General Counsel was present. The Professional Matters Committee met on October 25, 1965 and concurred in the recommendation of the Active Medical Staff, which it, the Professional Matters Committee, in Joint Conference Procedure had recommended to the Active Medical Staff on October 6, 1965 (Record pages 284-287).

On October 26, 1965, the respondent Board of Trustees, at their regular monthly meeting, confirmed the recommendations of its Professional Matters Committee to place the foregoing restrictions upon the petitioner (Record pages 287-292).

On February 25, 1966 at a meeting of the respondent Executive Committee, the respondents Lamaida and Dickman falsely charged the petitioner with unprofessional, cruel and unskillful treatment of a patient admitted to the hospital by the petitioner. *The petitioner was not present or invited to this meeting.* At this meeting the Executive Committee voted to recommend that the petitioner be removed from the medical staff of the hospital (Record pages 308 313; 315-316).

On February 28, 1966 the petitioner was notified that the Executive Committee would meet on March 2, 1966 to consider the petitioner's conduct since October 2,

1965 (Record page 318). Petitioner was present at this meeting, which was conducted in a "Star Chamber" atmosphere; the fact that the Executive Committee had already determined its course of procedure and was acting with prejudice and in an arbitrary fashion is evidenced by the minutes, showing that the petitioner did not have counsel and also that there was no review of the facts of his work (Record pages 320-326).

The Executive Committee then formulated a statement to justify its recommendation of February 25, 1966. This recommendation was conveyed to the Active Medical Staff on March 2, 1966, and at the urging of the respondents LaMaida, Fowler, Hacker and Dickman, the Active Medical Staff concurred in the recommendation of the Executive Committee and notified the Board of Trustees that the Active Medical Staff was recommending that the petitioner be removed permanently from the Staff of the hospital (Record pages 320-326).

The petitioner was notified of the action of the Active Medical Staff on March 3, 1966 (Record pages 331-332). The petitioner attempted to avail himself of an Appeal of this decision to the Professional Matters Committee of the Board of Trustees. It was the position of the Board of Trustees that the petitioner was not entitled to an Appeal (Record pages 333-338). However, the petitioner was invited to appear before the Professional Matters Committee of the Board of Trustees without counsel on March 22, 1966. At this meeting, respondents Lamaida, Collins and Waltz made additional false, malicious and untrue statements in order to induce the Professional Matters Committee, if it, in fact, needed such inducement, to approve the action of the Active Medical Staff and the Executive Committee. At said meeting, the Professional Matters Committee did recommend to the respondent Trustees

that the termination of said hospital privileges be made (Record pages 339-344).

On March 22, 1966, the respondents, Board of Trustees, at a meeting from which meeting the petitioner was excluded, acted upon the recommendation of the Professional Matters Committee and terminated the petitioner's privileges at the hospital. Thereupon, the petitioner was notified that he no longer had privileges and he was forced to discharge his patients from the hospital and give up his treatment of them.

The petitioner immediately brought an action for a mandatory injunction against the hospital to restore him his privileges. Due to the exigencies and length of the docket and the need for extensive discovery procedures, the matter did not come for Trial until January, 1967. In the midst of Trial, the mandatory injunction action was dismissed by the petitioner without prejudice and this action was filed. This action was based upon a conspiracy to injure the petitioner's character and reputation, a conspiracy to deprive him of his constitutional rights under the Fourteenth Amendment and Ohio Constitution, deprivation of his constitutional rights under the Fourteenth Amendment and Ohio Constitution and in libel and slander. The matter came on for Trial and, after four weeks of trial before a jury, at the close of the petitioner's case, upon Motion of the respondents for a directed verdict, the Trial Court granted judgment for the respondents and delivered an opinion which is set forth in the Appendix at page 1.

The voluminous record of approximately 1,400 pages contains substantial professional testimony contradicting the charges of unprofessional treatment and establishing that this petitioner's techniques were within the accepted standards of the medical community.

The questions raised in the appeal to the Court of Appeals for the Eighth Judicial District of Ohio are set forth in the Appendix at page 57. A visiting Court from the Ninth Judicial District confirmed the decision of the Trial Court (Memorandum Opinion, Appendix page 5). From that decision an Appeal was taken to the Ohio Supreme Court. The questions of law and constitutional questions raised in the Ohio Supreme Court are set forth in the Appendix at page 58. That Court reviewed the Motion to Certify and dismissed the Appeal *sua sponte* upon the basis that there was no substantial constitutional question involved. (See Order, Appendix page 8.)

REASONS FOR GRANTING THE WRIT.

I. The decision of the Ohio Supreme Court conflicts with the decisions of the federal courts of appeals as to whether acceptance of Hill-Burton funds by private, non-profit hospitals carries with it the obligation to observe federal constitutional mandates.

The Ohio Supreme Court held, sua sponte, that "no substantial constitutional question" existed herein, despite petitioner's persistent and sustained insistence in *all* of the courts below that there was sufficient "State Action" herein for the Fifth and Fourteenth Amendments of The Constitution of the United States to apply. This holding stands in irreconcilable conflict with the decisions of the Fourth Circuit in *Simkins v. Moses H. Cone Memorial Hospital,* 323 F.2d 959 (4th Circ. 1963), cert. den. 376 U.S. 938 (1964), and *Sams v. Ohio Valley General Hospital Association,* 413 F.2d 826 (4th Circ. 1969).

Both *Simkins, supra,* and *Sams, supra,* involved private, non-profit hospitals in the identical situation as the hospital in the instant case, i.e., all of these hospitals had

applied for and received Federal moneys known as Hill-Burton Funds (Hospital Survey and Construction Act), 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291 et seq. The question presented for the determination of the *Simkins* court was: "Whether the defendants have been shown to be so impressed with a public interest as to render them instrumentalities of government, and thus within the reach of the Fifth and Fourteenth Amendments to the Constitution of the United States." 323 F.2d at 965. The court there answered this question in the affirmative *Id.*, at 967. This is the same question which the petitioner herein urged to the Ohio courts.

Although *Simkins, supra,* involved a question of racial discrimination, ". . . the constitutional principles there announced apply in full strength to the non-racial issues of this case." *Sams, supra,* 413 F.2d at 828.

The Fourth Circuit further held: "Substantial Federal moneys invited and flowing into the defendant hospital under The Hill-Burton Act entail, in return, obligations of observance of Federal constitutional mandates. Disregard of them is State Action, for the act trusts the State to maintain a fair and just governance of [those] hospitals accepting the aid of the legislation. These are axioms of ready verification." *Id.,* at 829. *Citta v. Delaware Valley Hospital,* 313 F. Supp. 301 (E.D. Pa. 1970), another case dealing with the identical factual setting as exists herein, characterized it as a *"well-established principle"* that "state action" exists, and Federal constitutional rights apply, whenever a private hospital accepts Hill-Burton funds. *Id.,* at 307. An even more recent case, *O. T. Chiaffitelli v. Dettmer Hospital, Inc.,* ___ F.2d ___ (6th Circ. 1971) [No. 20390; decided and filed, Jan. 5, 1971] regarded the receipt of Hill-Burton aid as "fatal" to the defendant hospital's contention that an action for the ap-

plication of federal rights under 42 U.S.C. § 1983 could not be maintained against a private hospital. *Id.*, at ___.

In short, there is no question that the Federal Courts have recognized the presence of sufficient "state action" in the acceptance of Hill-Burton moneys to justify the application of Federal constitutional rights. The conflict between the decisions of those courts and those of the Ohio courts justifies the grant of certiorari to review the judgment below.

II. The decision of the court below conflicts with the decisions of the federal courts as to constitutionally required minimum elements of due process essential to an administrative evidentiary hearing.

On the basis of the facts of the instant case as summarized in the "Statement of the Case" *supra*, the court below, in holding that no substantial constitutional question was involved, impliedly held that the procedures followed herein were sufficient to meet the requirements of the Fifth and Fourteenth Amendments. In so holding, the court below placed itself in direct conflict with the decisions of both this Court and of the lower Federal Courts.

In its last term, this Court stated, in *Goldberg v. Kelly*, 397 U.S. 254 (1970):

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783; 58 L. Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). In the present context these principles require . . . timely and adequate notice *detailing the reasons for a proposed termination*, and an effective opportunity to defend *by confronting any*

adverse witnesses and by presenting his own arguments and evidence orally.' " *Id.*, at 267 (emphasis added).

In that same opinion, this Court then proceeded to elaborate on the above rights and to enumerate others which it considered essential to a fundamentally fair hearing, as follows:

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *Id.*, at 269 . . .

'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' . . . Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interest of [his client]. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. *Id.*, at 270 . . .

Finally, the decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing . . . To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on . . . And, of course, an impartial decision maker is essential. *Id.*, at 271"

The propriety and wisdom of the aforesaid essential elements of due process in such a setting as this have been concurred in and heartily approved of in *Jones v. Snead*, 431 F.2d 1115 (8th Circ. 1970), *Meredith v. Allen County War Memorial Hospital Commission*, 397 F.2d 33 (6th Circ. 1968) and *Birnbaum v. Trussell*, 371 F.2d 672 (2nd Circ. 1966), as well as by the Federal District Courts in *Citta v. Delaware Valley Hospital*, 313 F. Supp. 301 (E.D. Pa. 1970), *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (W.D. Mo. 1967) aff'd 415 F.2d 1077 (8th

Circ. 1969), *Scoggin v. Lincoln University*, 291 F. Supp. 161 (W.D. Mo. 1968) and *Orr v. Trinter*, ___ F. Supp. ___ (S.D. Ohio 1970).

Also in *Goldberg, supra*, this Court properly acknowledged that adherence to the essentials of procedural due process is especially important where the determination to be made by the administrative body rests on ". . . incorrect or misleading factual premises or on misapplication of rules or policies to the facts of the particular case," when such have been challenged by the affected party. *Goldberg, supra*, at 267. To the same effect, see *Birnbaum v. Trussell*, 371 F.2d 672 (2nd Circ. 1966), where the Second Circuit said:

> ". . . whenever there is a substantial interest, other than employment by the state, involved in one discharge of a public employee, he can be removed neither on arbitrary grounds nor without *a procedure calculated to determine whether legitimate grounds do exist.*" *Id.*, at 678 (emphasis added).

Highly relevant to this point is the comment of the District Court in *Citta, supra*, 313 F. Supp. at 308, 309:

> "It is obvious that what actually occurred on the operating table, the patient's condition. What the surgeon observed and the reasons for the medical and surgical judgments made, are all matters determinable only by an investigation of their critical factual bases. *The operating surgeon is in possession of almost all the facts necessary to evaluate the decisions he himself made.* We thus consider it a sensible postulate that before a surgeon's privileges are permanently restricted on the basis of what he did in any given instance, he must be given an opportunity to defend and explain his actions." (Emphasis added.)

In the case at bar, the Record contains considerable testimony supporting petitioner's medical judgment on the

matters of treatments and techniques which respondents alleged to have been improper, and upon which respondents allegedly based their various determinations.

Clearly, the decisions of this Court and of the lower Federal Courts conflict with the decisions of the Courts of the State of Ohio regarding the extent to which particular aspects of due process are applicable to a situation of this sort. This conflict justifies the grant of certiorari to review the judgment below.

III. The court below clearly erred in holding that the Civil Rights Act of 1871 was inapplicable to the instant case.

In its oral opinion (concededly "incoherent"), the Trial Court stated:

> "There is conspiracy which is set forth in the Civil Rights Act which is unlawful, but I can't see how the Civil Rights Act applies in this case. Just reading it, they (sic) are aimed at the Ku Klux Klan and that type of activity. There is no evidence of that here.
>
> Of course, there is the Meredith case. The whole subject applies to the Civil Rights statute. I believe the Meredith case is entirely right as far as its narrow holdings, but this language about the Civil Rights Act, I don't understand." (Appendix page 3.)

The narrow holding of the case cited by the Trial Court, *Meredith v. Allen County War Memorial Hospital Commission,* 397 F.2d 33 (6th Circ. 1968), was that 42 U.S.C. § 1983 and § 1985 (3) applied where the complaint alleged that the hospital commission and its individual members conspired to deny the plaintiff his constitutional rights in violation of the Civil Rights Act of 1871, since that hospital was a recipient of Hill-Burton funds. In light of such a holding, the petitioner in the instant case utterly fails to comprehend the reasoning and decision of

the Trial Court and of the Appellate Court which approved that decision. So far as petitioner is able to see, the holding in *Meredith, supra,* defies the logic of the Trial Court. In support of petitioner's contention stand *Birnbaum v. Trussell,* 371 F.2d 672, 673 (2nd Circ. 1966) and *Citta v. Delaware Valley Hospital,* 313 F. Supp. 301 (E.D. Pa. 1970).

Furthermore, even absent an allegation of conspiracy, an allegation of a denial of due process in the decision-making procedures by which a hospital recipient of Hill-Burton funds restricts the privileges of a physician practicing therein has also been held to state a claim under the Civil Rights Act of 1871. *Citta, supra,* 313 F. Supp. at 308.

Such manifest and inexplicable error justifies the grant of certiorari to review the judgment below.

Respectfully submitted,

SANFORD W. LIKOVER,
711 Leader Building,
Cleveland, Ohio 44114,
Attorney for the Petitioner.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAY 20 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1618.

S. J. PASTORELLE,
Petitioner,

v.

J. W. COLLINS, *et al.*,
Respondents.

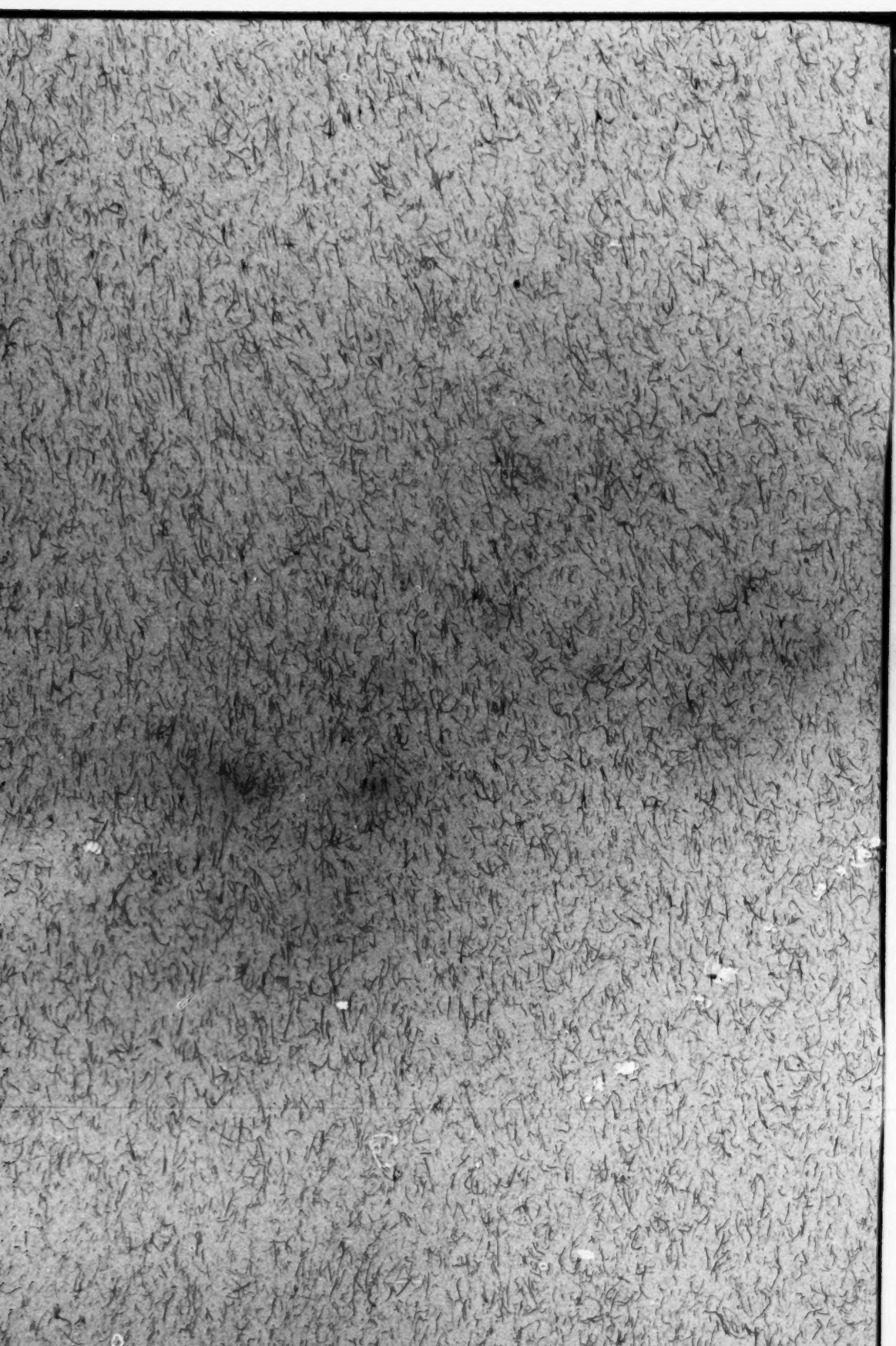
ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENTS IN OPPOSITION.

RUSSELL E. LEASURE,
SIDNEY D. L. JACKSON, JR.,
NORMAN S. JEAVONS,
GERALD W. BOSTON,
BAKER, HOSTETLER & PATTERSON,
1956 Union Commerce Building,
Cleveland, Ohio 44115,

GEORGE I. MEISEL,
SQUIRE, SANDERS & DEMPSEY,
1800 Union Commerce Building,
Cleveland, Ohio 44115,
Attorneys for Respondents.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647



INDEX.

Opinions Below ---------- 1

Jurisdiction ---------- 1

Question Presented ---------- 1

Constitution and Statutes Involved ---------- 2

Restatement of the Case ---------- 2

Reasons For Denying the Petition For a Writ of Certiorari ---------- 8

I. Introduction ---------- 8

II. The Decision Below Presents No Conflict With Any Decision of Federal Courts of Appeals Pertaining to the Acceptance of Hill-Burton Funds as Requiring the Application of Fourteenth Amendment Protections ---------- 10

III. The Decision Below Does Not Conflict With Any Decision of the Federal Courts as to the Constitutionally Required Elements of Due Process Applicable to the Procedures of a Private Hospital ---- 11

IV. The Civil Rights Act of 1871 Does Not Raise a Substantial Federal Question Since That Statutory Issue Was Not Properly Raised in the Courts Below ---------- 13

Conclusion ---------- 15

Appendix 1 ---------- 16

CITATIONS.

Cases.

Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) ---------- 12

Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (E.D. Pa. 1970) ---------- 13

Collins v. Hardyman, 341 U.S. 651 (1951) ---------- 14

Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir., 1961) ---------- 9

Ferguson v. Georgia, 365 U.S. 570 (1961) ---------- 13

Fisco v. East Cleveland, 59 Ohio L. Abs. 385, 99 N.E. 2d 615 (1950) ---------- 13

Fry Roofing Co. v. Wood, 344 U.S. 157 (1952) ---------- 9

Goldberg v. Kelly, 397 U.S. 254 (1970) ----------9, 11, 12

Grayson v. Harris, 267 U.S. 352 (1925) ---------- 9

Hannah v. Larche, 363 U.S. 420 (1960) ---------- 12

In Re Lamkin, 355 U.S. 59 (1957) ---------- 13

Kennedy v. General Beauty Products, Inc., 112 Ohio App. 505, 167 N.E.2d 116 (1960) ---------- 14

Monroe v. Pape, 365 U.S. 167 (1961) ---------- 14

Portland Railway Company v. Railroad Commission, 229 U.S. 397 (1913) ---------- 9

Sams v. Ohio Valley General Hospital Association, 413 F.2d 826 (4th Cir. 1969) ----------10, 13

Shelley v. Kramer, 334 U.S. 1 (1948) ---------- 15

Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964) ---------- 10

Snowden v. Hughes, 321 U.S. 1 (1944) ---------- 14

State Planters Bank & Trust Co. v. Fifth-Third Union Trust Co., 56 Ohio App. 309, 10 N.E.2d 935 (1937) ---------- 13

Stine v. Springfield City Lines, Inc., 106 Ohio App. 429, 155 N.E.2d 245 (1958) ---------- 13

The Civil Rights Cases, 109 U.S. 3 (1883) ---------- 15

Williams v. Georgia, 349 U.S. 375 (1955) ---------- 13

Constitution and Statutes.

United States Constitution, Fourteenth Amendment ----------2, 10, 11

42 U.S.C. § 1983 ----------2, 13, 14

42 U.S.C. § 1985(3) ----------2, 13, 14

Ohio Revised Code, § 2317.45 ----------2, 14, 16

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1618.

S. J. PASTORELLE,

Petitioner,

v.

J. W. COLLINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Ohio Supreme Court, the Cuyahoga County Court of Appeals, and the Trial Court are all unreported and are printed in Petitioner's Appendix.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

On the basis of the evidence in this case did the Courts below err in finding that the various hearings afforded Petitioner in connection with the termination of Petitioner's hospital privileges did not violate any applicable requirements of the Due Process Clause of the Fourteenth Amendment?

CONSTITUTION AND STATUTES INVOLVED.

The constitutional provision involved is the Fourteenth Amendment of the Constitution of the United States (Petitioner's Appendix, 61), the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1985(3) (Petitioner's Appendix, 62), and Section 2317.45, Ohio Revised Code (Respondents' Brief In Opposition, Appendix 1).

RESTATEMENT OF THE CASE.

Because of numerous inaccuracies and material omissions in Petitioner's Statement of the Case (Pet. Cert. 4-10), Respondents present the following restatement of the material facts, which reveal the inapplicability of Petitioner's Questions Presented and his Reasons for Granting the Writ.

The thirty-eight Respondents were trustees, physicians on the staff and the Executive Director of the Euclid-Glenville Hospital Association, a private, nonprofit corporation (hereinafter, the "Hospital"). Significantly, unlike the cases cited in the Petition, the Hospital itself was never a defendant in this action. Petitioner's suit, based upon several purported conspiracies to terminate his hospital privileges, was filed against the individual Respondents for several million dollars in damages.

At the conclusion of Petitioner's evidence after four weeks of a jury trial (nearly 1400 pages of Record[1]), and

---

[1] Petitioner failed to file the entire Record of the court below as required by Rule 21(1) of this Court in the absence of an agreement by Respondents to file only a portion thereof. There has been no such agreement and Respondents who refer to various portions of the Record herein therefore have submitted the entire Record for filing with this Court.

upon considering numerous exhibits, the trial court granted Respondents' motion for a directed verdict and observed, among other things, that to the extent Petitioner was entitled to due process rights, those rights had been afforded to him and that he received "fair treatment." None of the other ten judges who were asked to review Petitioner's appeal expressed a contrary opinion.

Respondents' Statement of the Case refers only to dates of certain formal meetings held by the Hospital's Trustees, the Medical Staff Executive Committee or Professional Matters Committee and rather than quoting from the testimony or unimpeached Joint Exhibits (JX), (comprised of contemporaneous minutes of the meetings stipulated to by all counsel), Petitioner merely characterizes such meetings as being "ex-parte" or "Star Chamber" proceedings (Pet. Cert. 4, 8), or sets forth argumentative conclusions complaining of defamatory charges made against Petitioner (Pet. Cert. 5, 7). There is no evidence in the Record which in any way supports such statements. The evidence adduced did disclose the following uncontroverted facts bearing upon Petitioner's claims of conflict on issues of procedural due process and the Civil Rights Act of 1871.

Petitioner, a physician, was associated with the Hospital for a period of years until March 22, 1966, at which time, following extensive investigations and a series of hearings, his privileges were terminated (JX6). Petitioner like all other physicians was granted certain privileges by the Hospital which were renewable on an annual basis (JX3).

The series of events which led up to, and resulted in the termination of Petitioner's privileges commenced in the summer of 1965. In July of that year, a patient was

admitted to the Hospital through the Emergency Room and was treated for a fracture by Petitioner, who was then on call (R. 645, 1285). As a result of Petitioner's attitude and treatment, the patient was prematurely removed from the Hospital by his parents and transferred to another hospital (R. 1371, 1372). The unusual occurrence of a patient's being removed to another hospital prior to recovery came to the attention of the Hospital administration (R. 69). The Executive Committee of the Medical Staff, in the performance of its duties under applicable By-Laws (JX3), commenced an investigation of the circumstances relating to the patient's transfer and concluded that Petitioner did not handle the matter properly. The investigation of this incident led to a reconsideration of Petitioner's professional activities and his relations with physicians, Hospital employees and patients.

In connection with Petitioner's due process contentions concerning lack of hearings or formal charges, and "rights" of appeal, the record shows that on July 29, 1965, the Chief of Surgery *wrote* Petitioner and *informed him* that the Medical Staff Executive Committee was investigating his handling of the above case (PX42). Petitioner, being apprised of the "charges" was *invited to and did attend* the Executive Committee meeting of September 10, 1965 (JX19). The Committee and Petitioner reviewed Petitioner's handling of that case. Prior to that date, Petitioner's counsel wrote the Hospital acknowledging that Petitioner knew the nature of the investigation (or in Petitioner's words "charges") and requested that the investigation be conducted by the Cleveland Academy of Medicine (PX7). The matter was presented to that organization which concluded that the investigation was an intra-hospital matter and did not intervene (contrary to

the misleading statement appearing at the bottom of page 4 of Petitioner's Statement of the Case).

Thereafter, as a result of the examinations and investigations, the Executive Committee felt it appropriate to submit to the Hospital's Active Staff its recommendations that Petitioner be removed from the Emergency Room fracture service, that he be required to have written consultation on all operative surgery, and that he be reduced in rank from the Active Staff to the Associate Staff. The minutes of the meeting of September 17, 1965 (JX20) amply summarize the basis for such action as follows:

> "Any action of the Executive Committee concerning S. J. Pastorelle, M.D. is based upon an accumulation of complaints from patients, relatives of patients, personnel, and physicians, upon an accumulation of evidence or indications of improper medical judgment, care of patients, non-compliance with hospital and Medical Staff regulations or policies, plus the unsatisfactory management of the Kaval case, the surreptitious taping of a phone call with a member of the Medical Staff, and, lastly, is based upon knowledge of circumstances that have engaged previous Executive Committees in attempting to resolve similar past problems with Dr. Pastorelle and to prevent continuance of his irregular practices."

Subsequently on October 11, 1965, Petitioner again *had notice of and did attend* the Executive Committee meeting, at which he was informed of its recommendations to be discussed by the Active Staff (JX23). Thereafter, a special meeting of the Active Staff was held and Petitioner's conduct was discussed at length. *Petitioner had prior notice of and was present at this meeting, had every opportunity to participate* in the discussions *and did in*

fact take part therein (JX24). After discussion, a *secret* ballot was taken and by a vote of 41 to 3 it was recommended by the Active Staff physicians that Petitioner be removed from the Emergency Room fracture service and by a vote of 41 to 2 it was recommended that he have formal written consultation on all major surgical cases.

Next, on October 25, 1965, Petitioner *had notice of and attended* a meeting of the Professional Matters Committee of the Trustees, at which the recommendations of the Active Staff were formally reviewed. Petitioner refused to present evidence or arguments on his own behalf, even though the Committee requested that he do so and afforded him a full opportunity to do so (JX25).

In December, 1965, the Professional Matters Committee met to discuss the annual appointment of all staff memberships. With respect to Petitioner, it was recommended that he be reappointed to the Active Staff, subject to the pre-existing restrictions, and that his status be reviewed prior to July 1, 1966 (JX26). This recommendation was thereafter submitted to and adopted by the Trustees (JX5).

At an Executive Committee meeting of the Active Staff on February 25, 1966, among other matters, Petitioner's recent treatment of another patient, Orlando, was discussed (JX28). It was pointed out that contrary to Hospital regulations, patient progress notes were two and one-half weeks behind and that Petitioner had consulted with a sales representative of a drug house and that the representative, at Petitioner's request, had examined the patient in the Hospital.

Petitioner was again *invited to and did appear before the Executive Committee* on March 2, 1966 to review his case management and deportment. Among other things,

the problem of his failure to cover his nose in surgery was discussed and considered as well as his handling of the Orlando case (JX29).

Thereafter, an Active Staff meeting was held, *notice of which was given Petitioner and which he attended,* at which time his professional conduct was again discussed. A *secret* ballot was taken and by a vote of 33 to 7, the Active Staff recommended that Petitioner's Hospital privileges be terminated (JX30).

Further reviewing action of this recommendation was taken by the Professional Matters Committee on March 22, 1966. *Again, Petitioner was invited to attend and did attend.* The matter was reviewed by the Trustees who then terminated Petitioner's privileges (JX31).

Throughout all of the hearings Petitioner was thoroughly aware of the reasons and basis for investigating his conduct and behavior. He was repeatedly and scrupulously given ample opportunity to examine the physicians who questioned his activities and to be heard and was heard, *on many different occasions.* The matter was duly reviewed by his colleague physicians and an opportunity for impartial review was afforded Petitioner by the Professional Matters Committee and by the Trustees. It is abundantly clear from the Record that any constitutional mandates relating to the applicable elements of due process were fully complied with.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI.

I.

INTRODUCTION.

Petitioner's reasons for granting certiorari assume:

(1) that the Ohio courts determined that Petitioner was not entitled to a due process, fair hearing, and

(2) that a due process, fair hearing was not afforded Petitioner.

Petitioner argues at some length that he was entitled to a due process, fair hearing in regard to his hospital privileges status because the hospital received federal financial construction assistance and under the Civil Rights Act of 1871. But the right, on whatever grounds, to a due process, fair hearing was never disputed by the Respondents or by the Ohio courts. The trial court recognized that Petitioner ". . . should have notice of what he is being accused of. He should have an opportunity to appear before his accusers and defend himself." (Pet. App. 4). And finally, the trial court *on the evidence*, concluded, "That has been done here. He [Petitioner] has had fair treatment . . ." (Pet. App. 4).

The Ohio Appellate Court " . . . examined with utmost care the entire transcript, and the long and lengthy bill of exceptions; . . . " (Pet. App. 7). That court concluded: " . . . after giving to the plaintiff the full benefit of the evidence as submitted, that the judgment entered by the trial Court, upon its determination of the evidence, was proper." (Pet. App. 7).

Although Petitioner in his Statement of the Case asserts a lack of knowledge of the charges, this simply does

not square with the Record as has been emphasized in the foregoing Restatement of the Case. The only other claim of denial of due process was the refusal of the Respondents to have Petitioner's personal attorney and a court reporter present at the various meetings of the medical staff and committees thereof at which Petitioner's professional qualifications, conduct and standing were considered.

Petitioner interprets *Goldberg v. Kelly,* 397 U.S. 254 (1970) as requiring counsel and a formal record as prerequisites in every case, to a due process, fair hearing. That decision, however, was rendered "in the present context" (397 U.S. 267) of a *governmental administrative hearing.* It is consistent, federal jurisprudence that under due process "the nature of the hearing should vary depending upon the circumstances of the case." *Dixon v. Alabama State Board of Education,* 294 F.2d 150, 158 (5th Cir., 1961); and see cases cited *infra,* Part III.

Both the questions of the nature of the hearing that would afford due process under the particular circumstances of this case and whether Petitioner had been afforded such due process were decided on the particular facts of this individual case. It is ". . . the ordinary rule . . . that the decision of the state courts upon a question of fact can not be made the subject of inquiry here." *Grayson v. Harris,* 267 U.S. 352, 358 (1925); *Portland Railway Company v. Railroad Commission,* 229 U.S. 397, 412 (1913); *Fry Roofing Co. v. Wood,* 344 U.S. 157, 160 (1952).

A decision by this Court on this case will establish no fundamental law.

II.

THE DECISION BELOW PRESENTS NO CONFLICT WITH ANY DECISION OF FEDERAL COURTS OF APPEALS PERTAINING TO THE ACCEPTANCE OF HILL-BURTON FUNDS AS REQUIRING THE APPLICATION OF FOURTEENTH AMENDMENT PROTECTIONS.

Petitioner maintains that the decision of the Ohio Supreme Court in overruling his motion to certify and dismissing his appeal to that Court on grounds that "no substantial constitutional question" was presented to it, is irreconcilable with prior decisions of federal courts of appeals. The decisions relied upon by Petitioner to demonstrate the existence of such a conflict so as to raise a substantial federal constitutional question are not in conflict, implicitly or expressly, with the holdings of either the Ohio Supreme Court or the Cuyahoga County, Ohio, Court of Appeals in this case.

Petitioner cites the decisions of *Simkins v. Moses H. Cone Memorial Hospital,* 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 938 (1964) (Pet. Cert. 10) and *Sams v. Ohio Valley General Hospital Association,* 413 F.2d 826 (4th Cir. 1969) (Pet. Cert. 10) for the proposition that receipt by a private hospital of Hill-Burton funds from the federal government (Hospital Survey and Construction Act, 42 U.S.C. § 291 *et seq.*), carries with it the obligation by that hospital recipient to observe Fourteenth Amendment guarantees in its actions, including any action terminating the privileges of a staff physician. The Ohio Supreme Court declined to accept jurisdiction and Ohio Court of Appeals' decision (Pet. App. 5-7) made no holding whatsoever that the receipt of such federal money by a private hospital did not render Fourteenth Amendment principles applicable to the procedures followed by such a hospital in terminating a physician's privileges. All of the cases cited by Petitioner in Part I of his Reasons

for Granting the Writ may be correct statements of the federal law on this issue, but Petitioner has made no showing, and none exists in the Record filed with this Court, to demonstrate any conflict between those cases and those of the Ohio courts in this case.

Indeed, as noted, the trial court *did* consider the application of due process and constitutional mandates to the Hospital procedures, but found no deprivation of due process on the basis of the evidence presented. Consequently, the affirmance of the trial court's judgment by the Ohio Court of Appeals and the Ohio Supreme Court cannot possibly be construed as holding that receipt of Hill-Burton funds rendered the due process clause inapplicable to the Hospital's procedures, since the trial court held that due process did apply and was applied. Therefore Petitioner's contention that a conflict exists between the federal courts and the Ohio courts is illusory and without any foundation.

III.

THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THE FEDERAL COURTS AS TO THE CONSTITUTIONALLY REQUIRED ELEMENTS OF DUE PROCESS APPLICABLE TO THE PROCEDURES OF A PRIVATE HOSPITAL.

Petitioner contends that once the Fourteenth Amendment applies to the procedures of a private hospital, that the Fourteenth Amendment due process clause invokes the standards of "an administrative evidentiary hearing." Petitioner quotes at length from the decision of this Court in *Goldberg v. Kelly,* 397 U.S. 254 (1970) (Pet. Cert. 12) which held that in the context of a *governmental* administrative hearing involving a citizen's right to receive welfare benefits, certain elements of due process must be satisfied. Respondents do not question the holding of this

Court in the *Goldberg* case, nor do Respondents seek to distinguish it from the present case for the reason that the Ohio Supreme Court and the Ohio Court of Appeals, in affirming the trial court, made *no* holdings that in any way conflict, directly or indirectly, with the *Goldberg* decision or the other decisions cited by Petitioner in Part II of his Petition.

Petitioner never contended in the trial court, nor in the Ohio Court of Appeals, nor in the Ohio Supreme Court that the applicable standard of due process in the procedures of private hospitals in terminating a physician's privileges, were the standards of "an administrative evidentiary hearing." Accordingly, the question of whether the standards of an administrative evidentiary hearing were satisfied in this case was not even raised in the courts below and cannot be raised in an appeal to this Court. Since the courts below never were faced with the issue as Petitioner now frames it, the decisions of the Ohio Court of Appeals and the Ohio Supreme Court cannot be construed as conflicting with this Court's decision in *Goldberg,* or the other decisions cited by Petitioner.

Moreover, the cases relied upon by Petitioner almost uniformly observe that due process must be considered in light of the institution under consideration, the identity of the parties and "in the *present context*" (*Goldberg, supra*). Clearly, due process requirements for a fair hearing vary according to the circumstances and must be adapted to particular situations. *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961); *Hannah v. Larche,* 363 U.S. 420, 442 (1960).

The issue of whether Petitioner was afforded a hearing compatible with the requirements of due process is a question of law and fact that can only be determined by reviewing the 1397 pages of Record and Exhibits in the trial court. The standards of due process set forth in

Sams v. Ohio Valley General Hospital Association, 413 F.2d 826 (4th Cir. 1969) (Pet. Cert. 11), and *Citta v. Delaware Valley Hospital,* 313 F. Supp. 301 (E.D. Pa. 1970) (Pet. Cert. 13) were in fact satisfied in this case as is amply demonstrated by a review of the Record. Therefore, there exists no conflict between the decisions of this Court or other federal courts and the decisions below of the Ohio courts.

IV.

THE CIVIL RIGHTS ACT OF 1871 DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION SINCE THAT STATUTORY ISSUE WAS NOT PROPERLY RAISED IN THE COURTS BELOW.

It is fundamental that in order for a substantial federal question to be a ground for granting a petition for writ of certiorari from a state court, the federal question must have been properly raised in the state court. *Williams v. Georgia,* 349 U.S. 375, 382-83 (1955), *In Re Lamkin,* 355 U.S. 59 (1957); *Ferguson v. Georgia,* 365 U.S. 570, 572 (1961). The rule is well settled in Ohio that a party may not, on appeal, raise a new theory of relief not tried below. *Stine v. Springfield City Lines, Inc.,* 106 Ohio App. 429, 434, 155 N.E.2d 245, 249 (1958); *Fisco v. East Cleveland,* 59 Ohio L. Abs. 385, 388, 99 N.E.2d 615, 617 (1950); *State Planters Bank & Trust Co. v. Fifth-Third Union Trust Co.,* 56 Ohio App. 309, 315, 10 N.E.2d 935, 939 (1937).

The Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1985(3), creates specific rights and remedies on which an independent cause of action may be based, entirely separate and different from the common law conspiracy actions pleaded and tried below in this case. Nowhere in Petitioner's petition filed with the trial court, his amended petition filed with the trial court, nor else-

where in the pleadings was there any allegation of or reference to the Civil Rights Act now relied upon to raise a substantial federal question. Only after conclusion of a four-week jury trial, did Petitioner file a trial brief which for the first time purported to raise an issue of the application of the Civil Rights Act, which accounted for the trial judge's reference to the Civil Rights Act in his oral opinion (Pet. App. 3).

Under applicable Ohio law, Petitioner was barred from basing error or otherwise placing reliance on the Civil Rights Act. Ohio Revised Code § 2317.45; *Kennedy v. General Beauty Products, Inc.*, 112 Ohio App. 505, 167 N.E.2d 116 (1960). Under this statute a party must give reasonable notice to the adverse party of its intention to rely on a federal statute, and had Petitioner done so, Respondents would have answered differently and made different trial preparations. This fact explains why neither the Ohio Court of Appeals nor the Ohio Supreme Court made any reference to the Civil Rights Act in their respective opinions affirming the judgment below. On the appeals to the Ohio Court of Appeals and the Ohio Supreme Court, Respondents consistently pointed out Petitioner's failure under Ohio statutory and decisional law to comply with the simple, straight-forward procedure of raising in the trial court reliance on a federal statute as a basis for his claim.

In addition to Petitioner's failure to raise timely the Civil Rights Act in the Ohio courts, it is clear that the statutes can have no application to the facts of this case. Under 42 U.S.C. §§ 1983 and 1985(3), the authority is uniform and overwhelming that a plaintiff must allege and prove the deprivation of a constitutional right and that defendants acted under "color of state law." *Collins v. Hardyman*, 341 U.S. 651 (1951); *Snowden v. Hughes*, 321 U.S. 1 (1944); *Monroe v. Pape*, 365 U.S. 167 (1961);

Shelley v. Kramer, 334 U.S. 1 (1948); *The Civil Rights Cases,* 109 U.S. 3 (1883). Petitioner not only never alleged that the individual Respondents acted under "color of law," but offered no such proof. The Respondents were sued as individuals for a common law conspiracy.

Thus, any claim for money damages predicated on the Civil Rights Act is wholly deficient for the reasons that the federal statutes were not properly raised in the Ohio courts and that Petitioner never alleged nor proved the essential elements of a cause of action under these statutes.

CONCLUSION.

Since no important procedural or substantive questions are presented and since the decision below is not in conflict with any federal decisions, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RUSSELL E. LEASURE,
SIDNEY D. L. JACKSON, JR.,
NORMAN S. JEAVONS,
GERALD W. BOSTON,
1956 Union Commerce Building,
Cleveland, Ohio 44115,

GEORGE I. MEISEL,
1800 Union Commerce Building,
Cleveland, Ohio 44115,
Attorneys for Respondents.

Of Counsel:
BAKER, HOSTETLER & PATTERSON,
1956 Union Commerce Building,
Cleveland, Ohio 44115,

SQUIRE, SANDERS & DEMPSEY,
1800 Union Commerce Building,
Cleveland, Ohio 44115.

APPENDIX 1.

Ohio Revised Code, § 2317.45.

Reasonable notice to adverse party.

Any party may present to the trial court any admissible evidence of the common law and statutes of every state, territory, or other jurisdiction of the United States, but to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.